82-1390

No. .....

In The

Supreme Court of the United States

October Term, 1982

Ronald N. Ashley and R. D. Thaggard, et al,
Petitioners

—v.—

The City of Jackson, Mississippi, et al, and
The United States of America,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Questions Presented

1. Whether consent decrees between a municipality the United States, and minority individuals, entered without findings of identified discrimination, may legally or constitutionally vitiate the individual right of action and bar persons not party to, and who were denied intervention in the consent decree litigation from instituting independent reverse discrimination suits against the municipality (A) challenging racial preferences *not required* by the decrees, (B) challenging preferences accorded to nondiscriminatees, or to discriminatees beyond the extent necessary to make them "whole", and (C) challenging the decrees as unlawful, unconstitutional, and void.

2. Whether, consistent with Due Process, the individual *right* to sue under, *inter alia*, the Fourteenth Amendment and Title VII may be judicially limited solely to the mere *possibility* of intervention in prior government consent decree litigation, especially where such intervention has been denied.

3. Whether Title VII's "parallel and overlapping remedies" confer upon District Court jurisdiction of individual reverse discrimination and retaliation suits where the resultant judgment on the merits might be inconsistent with prior consent decrees entered in settlement of a government "pattern or practice" suit.

Parties

Petitioners:

Ronald N. Ashley, R.D. Thaggard, James R. Berry, M. S. Rochester, C. L. Alexander, C. M. Crisco, and Ray Reed.

Respondents:

The City of Jackson, Mississippi, a municipal corporation; The United States of America; The City Counsel of Jackson, Mississippi; The Civil Service Commission of the City of Jackson; The Police Department of the City of Jackson; Russel C. Davis; Lavell Tullos; Phil Dates; Weaver E. Gore, Jr.; Dale Danks; Gene A. Wilkerson; William K. Dease, Sr.; Nancy Brown; Neilson Cochran; Luther Roan; James Black and Sister Josephine Theresa.

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

CONSTITUTION

STATUTES

No. .....

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Opinion Below

The opinion of the Fifth Circuit Court of Appeals sought to be reviewed (App. A, *infra*) is reported at 687 F.2d 66. Denial of Petition for Rehearing (App. B, *infra*) is not reported. Denial of suggestion for Rehearing En Banc (App. B, *infra*) is reported at 693 F.2d 133. A prior opinion of the Court of Appeals (App. C, *infra*) is reported at 618 F.2d 272, and the order vacating same (App. D, *infra*) is reported at 642 F.2d 97. The opinion of the District Court (App. E, *infra*) is reported at 18 EPD 8810, and the order thereon (App. F, *infra*) is not reported.

Jurisdiction

The opinion of the Court of Appeals for the Fifth Circuit was entered on September 27, 1982. Timely Petitions for Rehearing and for Rehearing *en banc* were denied on

November 19, 1982, and this petition for certiorari was filed within 90 days of that date. This Court's Jurisdiction is invoked under 28 USC § 1254 (1).

Constitutional Provisions and Statutes

The relevant constitutional provisions and statutes are: U.S. Const. Amends. V and XIV, Section B; 42 USC § 1981, 1983, 2000e-(a),(b),(f)-(i); § 2000e-2(a),(d); § 2000e-3(a); § 2000 e-5(a),(b),(e)-(g); § 2000e-6(a), and § 2000e-7; Mississippi Code, 1972, §§ 21-31-9, 21-31-13, and 21-31-19, all of which are set forth *seriatim* in Appendix G.

Statement of the Case

I. INTRODUCTION —

This proceeding involves two consolidated reverse discrimination suits against the City of Jackson, Mississippi, et al (hereinafter "City"). Petitioners contend that the City maintains a racially discriminatory pattern, practice, and policy regarding hiring and promotion, escpecially within the Police Department.

Jurisdiction of the District Court was invoked under the Fifth and Fourteenth Amendments to the Constitution of the United States, 28 USC §§ 1331(a), 1343, 2201 and 2202, and 42 USC § 2000e-5(f)(3). The matter in controversy exceeds $10,000, exclusive of interest and costs. Pendent jurisdiction was asserted over state law claims.

The respondents contended that the challenged practices were required by three prior consent decrees, and petitioners alleged to the contrary, or alternatively, that the decrees are illegal, unconstitutional, and void.

The District Court dismissed for lack of subject matter jurisdiction, being of the opinion that petitioners suits constituted impermissible collateral attacks upon the City's "compliance" with the decrees. The Fifth Circuit affirmed, vacated its opinion, and again, affirmed.

II THE CONSENT DECREES—

On March 25, 1975, three consent decrees were simultaneously entered in the cases of *United States v. City of Jackson* (hereinafter *"USA"*), *Corley v. Jackson Police Department* (hereinafter *"Corley"*), and *Bell v. City of Jackson.* Each decree incorporated the terms of the others, and specified that the entry thereof did not constitute an admission or an adjudication of any past racial discrimination by the City. Petitioners had no prior notice of and were not party to the decrees, nor were they in privity with, nor were their interests represented by any party. Petitioners causes of action did not accrue until a year or more subsequent to the entry of the decrees.

The *USA* decree, *inter alia,* (1) enjoined the City from engaging in any act or practice which had "the purpose or effect of discriminating against any employee of, or any applicant or potential applicant for employment" because of such individuals' race, (2) established "a goal of hiring blacks for one-half of all vacancies" in most job classifications, (3) required a recruiting program to secure enough qualified blacks to meet the hiring goal, and (4) required the establishment of a non-discriminatory method for promoting qualified incumbent employees of the Fire and Police Departments. Excepting limited priority consideration to be given a defined class of incumbent black employees, the decree did not require the use of racial preferences.

The *Corley* decree, *inter alia,* required the establishment of separate promotion eligibility lists for black and white employees of the Police Department on the basis of objective, reviewable, and *nondiscriminatory* standards and, subject to the availability of *"qualified"* black candidates, required that promotions be made "alternately from each such list in a one-to-one ratio until the proportion of black persons in supervisory positions in the ranks above patrolman is subtantially equal to the proportion of blacks to whites in the working age population of the city of Jackson." The term "qualified" was not specifically defined in the decrees.

III. THE "REVERSE" DISCRIMNATION SUITS—

A. The "Hiring" Case — *Ashley v. City of Jackson.*

1. Racial Discrimination-

About March 1975, the Chief of Police agreed to immediately hire Ashley as a police officer, having determined that Ashley's status as a sworn Police Reserve Officer fully qualified him for the position. Said employment was subsequently and continually denied because Ashley was Caucasian, and to hire him would cause a variance in the fifty-fifty hiring goal established in the *USA* decree. Ashley filed a timely charge of racial discrimination with the Equal Employment Opportunity Commission, and, upon receipt of notice of his "right to institute a civil action", timely filed his lawsuit.

2. Discriminatory Retaliation-

About January, 1977, Ashley again attempted to secure employment as a Police Officer and competed for a position in an upcoming Police recruit class. Although he received the highest overall score of 249 applicants, he was again denied employment. Ashley filed a timely charge with the EEOC, charging that the City had discriminated against him in violation of 42 USC §2000e-3(a) in retaliation for his having opposed the City's discriminatory employment practices and having filed the aforesaid EEOC charge and lawsuit. The EEOC investigated and determined that reasonable cause existed to believe the charge to be true. Conciliation efforts failed, and upon receipt of the statutory notice, Ashley amended his original complaint to add a count based on said retaliation.

3. The Discriminatory Hiring Practices-

In order to meet the hiring "Goal", the City, *inter alia*, insulated blacks from competing with all other applicants by reserving approximately one-half of new Police recruit positions for blacks, and by establishing separate eligibility lists for black and white applicants and hiring alternately from each list in a one-to-one ratio without regard to the applicant's overall merit standing. Such racially-based practices caused blacks to be hired, because of their race, over more qualified

Caucasian applicants.[1]

The City occasionally "froze" the evaluation and hiring of white applicants and limited the number whites hired in order not to exceed the number of minimally qualified blacks available, although vacancies existed and qualified whites were available to fill them. This resulted in numerous white applicants being delayed in obtaining employment, because of their race, with a corresponding loss in seniority, and for some, a loss of twenty-year retirement as opposed to a thirty-year plan adopted by the City during the delay. Such practices also resulted in numerous white applicants being denied employment altogether.

B. The "Promotion" Case - *Thaggard, et al, v. City of Jackson.*

Thaggard was timely filed in May, 1978, after charges had been filed with the EEOC[2] and after receipt of the statutory

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[1]In 1977, the City evaluated 249 applicants for appointment to a forty-seat Police Recruit Class. Based upon scores on an initial employment test, separate employment eligibility lists were established for black and white candidates. Presumably, the test was validated or approved by the Justice Department as required by the *USA* decree. Only the "top" 40 candidates on each list were further evaluated, and 20 candidates from each list were subsequently appointed. Of the 20 blacks who were hired, only 1 would have scored in the top 40 on a single, composit eligibility list, and only 3 would have scored within the top 80. Therefore, had the City further evaluated the top 80 candidates, rather than utilizing the said race-based selection procedure, the said class would have been comprised of 37 whites and 3 blacks, and an additional 17 whites would have been hired. Similar, if not identical procedures were also used in filling subsequent classes.

[2]Prior to filing EEOC charges, some of the petitioners and other Jackson Police Officers instituted an action in the Chancery Court of Hinds County, Mississippi, *Reed, et al v. City of Jackson*, seeking to compel the City to make promotions solely on the basis of merit as required by State Law. *Reed* was removed by the City to the United States District Court for the Southern District of Mississippi, C.A. No. J-76-222 (n). The case was remanded after the Court concluded that the term "qualified", as used in the one-to-one promotion provision in the *Corley* decree, would have to be interpreted in order to determine whether the City was required to promote

notice of "right to sue". The complaint alleges that the City discriminates against whites in the making of promotions in the Jackson Police Department. The cause of action arose about November, 1977, the first occasion for the City to make Police Sergeant promotions since the entry of the decrees. At said time, the City established separate promotion eligibility lists for black and white candidates in accordance with the *Corley* decree. However, 14 promotions were made alternately from the two lists irrespective of the *relative* qualifications of the black candidates as compared to all other candidates, resulting in "less" qualified blacks being promoted in preference to "better" qualified whites solely because of their race.

Based upon scores derived from promotion examinations and evaluations, the *Thaggard* petitioners were among the highest scoring of approximately 145 candidates,[3] and were generally within the group from which seven promotions would have been made if the City had hired on the basis of merit and had not filled half of the 14 available positions with blacks.[4] The complaint alleges that the blacks would not have been promoted but for their race.[5].

C. Common Allegations-

Both *Ashley* and *Thaggard* allege, *inter alia*, (1) that the challenged employment practices are not required by the decrees; (2) that the decrees do not require racial preferences of blacks who are not identifiable victims of discrimination, or

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on such basis without regard to the relative merit standing of the black candidates, but that a question regarding the interpretation of the decree did not provide a basis for removal.

[3]The overall numerical standing of Petitioners was: Thaggard, 10th; Berry, 12th; Rochester, 13th; Alexander, 16th; Crisco, 17th; and Reed, 22nd.

[4]Fourteen promotions were made, and seven out of the nine highest-scoring white candidates were promoted. If the other seven promotions had been made consecutively in rank order by overall score, Thaggard, Berry, Rochester and Alexander would have been promoted.

[5]The overall standing of the seven blacks who were promoted was 44th, 62nd, 97th, 108th, 116th, 117th, and 123rd.

that go beyond restoring such victims to their "rightful place"; (3) alternatively, that the decrees are illegal, unconstitutional, and void; and (4) alternatively, that petitioners are victims of the City's past racial discrimination and that, as such, they are entitled to compensation.

IV. JUSTICE DEPARTMENT POLICY—

Approximately one year prior to the entry of the consent decrees, the United States Department of Justice, Department of Labor, Civil Service Commission, and the EEOC issued a policy statement entitled *Memorandum-Permissible Goals and Timetables in State and Local Government Employment Practices* (App. H). The purpose was to address "the question of how the agencies in the Executive Branch. . . should *act* to implement the distinction between proper goals and timetables on the one hand, and impermissible quotas and preferences on the other, with due regard for the merit selection principles which many states and local governments are *obliged* to follow. . . " The agencies recognized "that there is no conflict between a true merit selection system and equal employment opportunities laws—because each requires nondiscrimination in selection, hiring, promotion, transfer and layoff, and each requires that such decisions be based upon the person's ability and merit, *not on the basis of race*. . . " Said policy specifies that "any system which requires that considerations of relative abilities and qualifications be subordinated to considerations of race. . . in determining who is to be hired, promoted, etc., in order to achieve a numerical position has the attributes of a quota system which is deemed to be impermissible. . . ," and that "Under a system of goals, therefore, an employer is never. . . required to hire a less qualified person in preference to a better qualified person. Said policy applied equally to goals sought "in court" as well as to those "accepted voluntarily by employers".

V. STATE CIVIL SERVICE LAWS—

The applicable laws of the State of Mississippi pertaining to civil service (App. G) require, *inter alia*, that "all appoint-

ments to and promotions in'' the Police and Fire Departments ''shall be made solely on merit, effieciency and fitness,'' and that the City shall ''give preference'' in hiring ''to those having the best qualifications''.

VI. THE DISTRICT COURT DECISION—

The District Court's Order (App. F) granted the Respondent's motion to dismiss for lack of subject matter jurisdiction, the Court being of the Opinion (App. E) that Petitioner's were challenging the City's ''compliance with'' the decrees, and that same ''constitutes a collateral attack'' which the Court found ''impermissible.'' The Opinion also reflects that the *Thaggard* petitioner's motion to intervene in *Corley* was denied the same day their private actions were dismissed.

VII. THE FIFTH CIRCUIT DECISIONS—

A. The First Decision

In June, 1980, the Fifth Circuit, viewing the question as whether petitioners may collaterally attack the City's ''compliance with'' the decrees, affirmed the District Court. Over nine months later, said decision was vacated on petition for rehearing. Oral argument was subsequently heard by a second panel without result.

B. The Final Decision.

On September 27, 1982, the Court again affirmed dismissal for lack of subject matter jurisdiction, noticeably concluding only that the complaints constituted collateral attacks upon ''the decrees,'' rather than upon the City's ''compliance with'' the decrees, as found by the District Court. The Court recognized, but evaded resolution of Petitioner's contention that they are not ''attacking'' the decrees because the challenged practices ''are not required'' thereby. Stating that the lower court ''did not err in refusing to speculate regarding what constitutes compliance with or is required by'' the decrees, the Court concluded that it was not it's duty'' to decide—in a collateral proceeding—whether the challenged hiring or promotion practices are either allowed or mandated by'' the decrees, because ''[s]uch a determination would

mean that the parties to the consent decrees could 'be faced with either inconsistent or contradictory proceedings'".

For a similar reason, the Court dismissed an alternative count alleging that Petitioners, as "innocent" victims of the City's (1) past discrimination, if any, and/or (2) it's preference of non-discriminatees, were at least entitled to monetary compensation for their injuries and damages.

The Court affirmed dismissal of alternative allegations that the decrees are "illegal, unconstitutional, or void" because to allow an attack on such grounds would "violate the policy under Title VII to promote settlement," would "undercut notions of judicial effiency and finality of judgment, and would unfairly prejudice other parties and nonparties."

Based upon their argument that the decrees actually prohibit the racial discrimination complained of, and noting that the District Court retained jurisdiction of the decrees for "implementation" and "continued compliance", the Court apparently (incorrectly) viewed Petitioners as "parties" to the decrees who "have a remedy through the enforcement of the decree in the original action and not in an independent action."

The Court's refusal to allow petitioners to pursue their claims in an "independent" or "collateral" proceeding logically leaves them only one avenue to the Courts, i.e. a "direct" action. In view of this, and the holdings in the cases cited, it cannot fairly be denied that the clear impact of the Court's decision, if not it's precise holding, is that private individuals, not party to prior consent decree entered between an employer and others in settlement of a racial discrimination suit, may only sue the employer for post-decree discrimination by intervening in the consent decree litigation, because the challenged practices *might* have been legally required by such decree. In any event, the Court held, "a consent decree is not subject to collateral attack."

Although the Court limited the *Ashley* and *Thaggard* Petitioners' access to the courts to intervention as aforesaid, it acknowledged that their "various motions to intervene in the

cases resulting in consent decrees were denied, but stated that it was "not faced with determining whether (Petitioners) are entitled to" so intervene.

ARGUMENT

I. Introduction—

This case involves important questions regarding fundamental rights of non-minority individuals to due process, and statutory rights to institute lawsuits challenging racially discriminatory employment practices, and the impact upon those rights of prior consent decrees between the employer and other parties.

Initially, it is important for this Court to decide whether such decrees provide a basis upon which courts may negate or circumvent the private *right* of action by judicially limiting individual access to the courts to a mere *possiblilty* of intervention in the consent decree litigation. Petitioners believe that the uncertainty of access to the courts created by the decision below threatens the effectiveness of the private right of action as a vital means of enforcing Title VII, and is alone sufficient reason to merit this Court's attention.

Additionally, the Court should establish whether such decrees are immune from attack by non-parties as being illegal, inequitable, contrary to public policy, and unconstitutional, or as otherwise being non-binding.

The questions presented are of great significance in the enforcement of Title VII. The Attorney General is responsible for enforcement of Title VII in cases involving state and local governments, and has entered consent decrees with government employers affecting the careers of thousands of public employees, and is likely to continue to do so in the future. This case offers an excellent opportunity for this Court to state, in view of applicable Justice Department policy and the law, and in the absence of an appropriate finding or admission of racial discrimination, whether it is necessary or permissible for a public employer to hire or promote on the basis of race in

order to meet affirmative action "goals" required by the United States, or agreed upon in consent decrees with the federal government, and to delineate the extent of an employer's liability to "innoncent" persons who are adversely affected by non-remedial preferences of minorities who are not personally an identifiable victim of racial discrimination by the employer.

That the decision below is highly questionable is demonstrated by the fact that the Fifth Circuit has once vacated a decision adverse to petitioners, and heard oral argument on three occasions before arriving at a final decison. Also, subsequent to said decision, as discussed *infra*, the United States has sought intervention in other consent decree litigation for the purpose of *challenging* as illegal, inequitable, and unconstitutional a "one-to-one" promotion provision virtually indentical to that contained in the *USA-Corley* decree. In support of intervention, the Attorney General certified the case to be of general public importance, and the question of the propriety of such promotions was asserted to be of *exceptional* importance. No less, the questions herein.

Petitioners believe that resolution of the issues presented is important to the national interest insofar as immediate guidance is needed by public employers in the development and implementation of sound government policies, procedures, and requirements pertaining to nondiscriminatory employment practices, and in ascertaining the proper statutory and constitutional scope of governmental authority to fashion affirmative action goals. Guidance is also needed by public employees and applicants for employment in order that they may be apprised of the procedure by which they may have access to the courts to challenge practices that contravene the law, or that exceed the permissible scope of "remedial" preferences.

II. The Decision Below Vitiates the Private Right of Action as a Means of Enforcing the Civil Rights Acts, and Conflicts With Decisions of the Supreme Court and

Other Courts of Appeal.

A. Title VII Expressly Authorizes An Independent Action In Lieu of Intervention In Prior Government Suit.

Title VII of the Civil Rights Act of 1964, 42 USC §2000e *et seg.* (Hereinafter "Title VII"), was enacted by Congress "to bring employment discrimination to an end," *Albemarle Paper Co. v Moody,* 422 U.S. 405, 417 (1975), and "to make the victims of unlawful discrimination whole" by restoring them, "so far as possible... to a position where they would have been were it not for the unlawful discrimination." *Ibid,* at 421.

While "[c]ooperation and voluntary compliance were selected (by Congress) as the preferred means for achieving this goal," *Alexander v. Gardner-Denver Co.*, 414 US 36, 44 (1974), Congress also gave private individuals a significant role in the enforcement process, "*Ibid,* at 45, a point not mentioned by the courts below. If the Equal Employment Opportunity Commission (Hereinafter "EEOC"), or the Attorney General (Hereinafter "AG") in a case involving a government, governmental agency, or a political subdivision, brings suit against an employer under § 706, "the aggrieved person may bring his *own* action", and "may *also* intervene in the EEOC's (or the AG's) enforcement action." *General Telephone Co. v. EEOC,* 446 US 318 (1980) (emphasis added).

Clearly, whether or not the AG had instituted suit against the city as a result of Petitioner's EEOC charges, §706 affords them an absolute *right* to institute their own actions, and dismissal of same was error. Even if the AG *had* filed a §706 suit, and intervention therein had been denied as untimely, etc., petitioners' alternative right to institute a timely private suit under §706 would not be barred. Logically the same applies regarding intervention *in a* government §707 suit, such as the *USA* case. And, in view of Congress' "General intent to accord parallel or overlapping remedies against discrimination," *Alexander, supra,* at 47, the individual's right to institute a private suit as an alternative to intervention in prior

government litigation should also extend to petitioners' claims under the Constitution and other federal statutes.

In contrast, where a suit is brought by the EEOC or the AG under § 707 of Title VII, 42 USC 2000e-6, private parties have no statutory right to intervene comparable to the right established by § 706. *EEOC v. United Air Lines, Inc.*, 515 F.2d 946 (7 CA 1975); *U.S. v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826 (5 CA 1975), cert. den. 425 US 944. The *USA* decree was entered in a government § 707 suit and, accordingly, petitioners had no right to intervene therein. Thus, the decision below limits the procedural avenue by which petitioners might prosecute their § 706 actions *solely* to *permissive* intervention in the *USA* case. Title VII affords no basis for such a judicial restriction of the private right of action, and the decision should not stand.

In view of the fact that Congress afforded "aggrieved persons" *both* the right to institute their own lawsuit and to intervene in a governmental suit under § 706, it is incongruous to argue that the omission of an equivalent right of intervention under § 707 infers that Congress also intended to negate the aggrieved person's right to independently file a § 706 suit, and to limit such person's access to the Courts to a mere *possibility* of intervention in a related government § 707 suit. "It was unquestionably the design of Congress in the enactment of § 707 to provide the government with a swift and effective weapon to vindicate the broad public interest in eliminating unlawful practices, at a level which may or may not address the grievances of particular individuals. Rather, it is to those individual grievances that Congress addressed § 706." *U.S. v. Allegheny Ludlum Ind., Inc.*, 517 F.2d 826, 843 (5 CA 1975)

Thus Congress accomodated the need for "swift" government action, which would no doubt be delayed if intervention of right in 707 actions had been allowed, but preserved the private right of action under § 706. The decision below dismissing petitioner's private actions because of possible inconsistency with the *USA* decree. Thus contravenes the letter, and the spirit, of Title VII.

B. The Lower Court's Decision that the Consent Decrees Prelude Independent Title VII Actions Conflicts With Decisions of the Supreme Court and Other Courts of Appeal.

In *General Telephone Co. v. EEOC*, 446 US 318 (1980), this Court stated that "[t]he 1972 amendments (to Title VII) retained the private right of action as 'an essential means of obtaining judicial enforcement of Title VII,' while also giving the EEOC broad enforcement powers. In light of the 'General intent to accord parallel or overlapping remedies against discrimination', we are unconvinced that it would be consistent with the remedial purpose of the statutes to bind all 'class' members with discrimination grievances against an employer by the relief obtained under an EEOC judgment or settlement against the employer. This is especially true given the possible differences between the public and private interests involved" 446 US at 332, 333 (citations omitted). Of course, this same principle applies to judgments obtained by the AG, such as the *USA* decree. And, if such decrees do not bind "class" members who are benefitted therby, neither do they bind non-parties, such as petitioners, nor preclude their private lawsuits. The Second, Eighth, and Ninth Circuits have also held that consent decrees obtained by the AG in Title VII litigation do not bar subsequent suits by non-parties.

In *Ward v. Arkansas State Police*, 653 F.2d 346 (8 CA 1981), the Eighth Circuit held that a consent decree between the United States and the State of Arkansas, which prohibited all discriminatory hiring practices by the State Police, did not preclude Ward, who was not a party to the decree, from pursuing his Title VII hiring-discrimination claim individually "merely because he might have obtained some relief if he had acted expeditiously under the consent decree." *Ibid*, at 348.

The Ninth Circuit reached the same result in *Bratton v. Bethlehem Steel Corp.*, 649 F.2d 658 (9 CA 1980). "As the plaintiffs were neither parties to the [consent decree] litigation nor in privity with the governmental agencies who were parties, they clearly are not bound by the terms of the consent

decree. To hold otherwise would, for all practical purposes, forclose a private right of action whenever the EEOC has already concluded enforcement activities." *Ibid,* at 669.

Similarly, the Second Circuit held that "[f]or purposes of res judicata or collateral estoppel, the private citizens in this case are not bound by the Attorney General's action in the former case since they neither were parties to it, nor have interests such as to be in privity with the Attorney General. Therefore, the judgement in the previous case does not have conclusive force here." *Williamson v. Bethlehem Steel Corp.*, 468 F.2d 1201, 1203-04 (2 CA 1972) (citations omitted). "The purpose of permitting the individual who has been discriminated against to seek relief where the government has omitted to do so—is plainly to make certain that the individual employee is protected." *Ibid,* at 1204.

The foregoing decisions illustrate that consent decrees between the government and an employer do not bar non-parties from subsequently filing Tilte VII suits against the employer. The City's answer admits that petitioners herein were not party to the subject consent decrees. Thus, the lower court's dismissal of petitioner's reverse-discrimination suits because of the existence of the decrees is in conflict with the aforesaid decisions, as well afs a prior decision of the Fifth Circuit. See *U.S. v. Allegheny-Ludlum Ind., Inc., supra.*

The decision below is particularly harsh in that the Fifth Circuit dismissed on nothing more than respondent's bare assertion that petitioners were "attacking" the consent decrees.

In *Sester v. Novack Investment Co.*, 638 F.2d 1137 (8 CA 1981), modified en banc, 657 F.2d 962 (1981), a private employer similarly asserted that its' implementation of an affirmative action plan (hereinafter AAP) constituted a bar to a white male's reverse discrimination suit. Equally applicable here, the panel stated that "to conclude...that an employer who is attempting to implement an (AAP) is immune from suit...would present a situation of fundamental unfairness. For instance, it is possible that an employer could be im-

plementing an invalid plan, or even if valid, the employer could misapply it in a given situation. To deny *any* cause of action to a white individual merely because his employer or prospecitve employer asserts the existence of an (AAP) could create the potential for abuse by employers." The panel concluded that the employer's AAP "should be treated as in the nature of an affirmative defense" which "creates factual issues for the jury both on the issues of the bona fide nature of the plan as well as on the proper implemention of the plan." 638 F.2d at 1145 (emphasis added). An en banc court reversed in part, and held that "[t]hat issue of the validity of an (AAP) is one for the court and not the jury." *Setser, supra,* 657 F.2d 962, 969. The court held that to rebut a prima facie case of reverse discrimination, the employer must "produce some evidence that its affirmative action program was a response to a conspicuous racial imbalance in its work force and is remedial. — Evidence that the employer implemented its plan. . . *in adherence* to a court order, whether entered *by consent* or after contested litigation, would be sufficient" to show a remedial purpose. *Ibid* at 968. Such evidence may be rebutted by showing that the AAP was not "remedial" or that it "unreasonably exceeds its remedial purpose." *Id.*, at 969.

Similarly, a public employer who asserts "compliance with" a "valid" consent decree in defense to a reverse discrimination suit should be required to prove that its use of racial classifications that affect the interests of nonminority individuals meets the constitutional standard. When an individual is classified by government on the basis of race, "the burden he is asked to bear on that basis [must be] precisely tailored to serve a compelling governmental interest. *Regents of the University of California v. Bakke,* 438 US 265, 299 (1978).

The Court should use this case to establish that racial preferences accorded pursuant to consent decrees are no less subject to review under constitutional standards than any other racial discrimination case in the public employment context.

III. Petitioner's Action Do Not Constitute An Impermissible Collateral Atack Upon Any Valid or Binding Provisions of the Decrees.

A. The Court of Appeals Erred In Refusing To Interpret The Decrees

As a preliminary matter, the Fifth Circuit incorrectly concluded that the lower court did not determine the requirements ot the decrees. It would have been virtually impossible for the District Court, and the first panel to hear these appeals, to conclude that these actions constituted a challenge of the City's *compliance with* the decrees without having first determined what the decrees require. Accordingly, the Fifth Circuit erred in failing to interpret the decrees *de novo* to determine whether the challenged preferences are necessary or permissible under the terms of the decree. If preferences are not required, these actions do not "attack" the decrees. If required, but illegal, contrary to public policy, unconstitutional, or otherwise not binding on petitioner's, their actions are not "impermissible."

As an additional preliminary matter, the Fifth Circuits' view that a consent decree cannot be *interpreted* in "collateral" proceeding is contrary to proceedings in other courts. A question requiring an interpretation of a decree is not a challenge of its validity. *Williams v. Nylund,* 268 F.2d 91 (10 CA 1959). A consent decree should be construed basically as a contract, *U.S. v. ITT Continental Baking Co.*, 420 US 223, 236 (1975), and the interpretation of the written language of a contract is a matter of law and is reviewable as such. *Eaton v. Courtaulds of N. America, Inc.*, 578 F.2d 87 (5 CA 1978). C. Wright & A. Miller, Federal Practice and Procedure: Civil, 2588. Judge Gee's comments in *U.S. v. City of Miami,* 644 F.2d 435, 451, N. 7 (5 CA 1981) are equally applicable here: "It is difficult to envision an issue more *purely legal* than that of whether one written agreement, the consent decree, conflicts with another written" document. Without having determined that any "conflict" exists between the decrees and petitioner's complaints, there was no basis for disimissal of these

actions as being "attacks" upon the decrees. The Court has impliedly sanctioned the interpretation by one court of a decree entered in another. See *U.S. v. Armour & Co.*, 402 US 673 (1971) (involved interpretation by Illinois District Court of decree entered in Supreme Court of the District of Columbia).

B. Properly Interpreted, The Decrees Do Not Require The Challenged Practices

1. The Hiring Case

The *USA* decree, which was entered for the purpose of enforcing Title VII, enjoins discrimination in hiring (and promotion) against *any* applicant for employment with or employee of the City of Jackson. Title VII's prohibition of discrimination against "any" person protects white persons as well as minorities. *McDonald v. Santa Fe Trail Transp. Co.*, 427 US 273 (1976). Excepting limited priority preferences for a "class" of incumbent empolyees, the decree contains no provision requiring or allowing separate employment eligibility lists, "one-to-one " hiring, "freezing" the hiring of whites, etc., or other such race-based employment practices as are challenged by petitioners.

Section 21-31-19, Miss. Code, 1972 (App. G), requires merit hiring and "preference [of] those having the best qualifications." 42 USC § 2000e-7 provides that such state laws remain binding. The civil service statutes of the State of Mississippi were not found to be unlawful, nor were they set aside by the decrees. Had the City "contracted" with the United States to hire (or promote) in a manner contrary to said laws, such would render the decrees void, *Harris v. Runnels*, 53 US 79 (1851), or unenforceable, *W. R. Grace & Co. v. Loc. Union No. 759, 652 F.2 1248, 1256 (5 CA 1981).*

If there can be any reasonable doubt in view of the foregoing that the decrees cannot, and do not require racial preferences in order to meet the hiring "goal", then it is proper, as an "aid to construction", to rely upon "any technical meaning words used may have had to the parties." *ITT, supra* at 238. The applicable policy of the United States Department

of Justice (App. H) specifies that it is "impermissible" to accord racial preferences, or to hire a "less" qualified person in preference to a "better" qualified person in order to meet a hiring "goal".

Thus, the initial count in the *Ashley* complaint does not "attack" the decrees, as racial preferences are not required thereby.

2. The Promotion Case

Although the *Corley* decree required the establishment of separate promotion eligibility lists for black and white candidates, it *conditions* the alternate *use* of the lists in making promotions upon the blacks being *qualified.*[6] Petitioners interpret "qualified", as used in *Corley,* to mean "equally as well qualified as the white officers who are to be promoted," or "not *less* qualified than white officers who are *not* to be promoted."[7]

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[6] In a related case, the District Court determined that the term "qualified" is subject to interpretation. See Note 2, *supra.*

[7] This interpretation is supported by the affidavit, filed in *Thaggard,* of former City Commissioner Doug Shanks, a defendant in the consent decree litigation, wherein he stated, in pertinent part, that:

> "By agreeing to the (*USA, Corley,* and *Bell*) consent decrees, I did not intend and I do not interpret the terms thereof to provide that the laws of the State of Mississippi pertaining to civil service would be stayed, replaced or otherwise affected thereby, either permanently or on a temporary basis, and I intended and understood, and I interpret the consent decrees to require that once an individual had applied with the City of Jackson for *employment or promotion,* that such individual would still be required *to compete* with all other applicants for the position sought *in accordance with merit principles,* and that no individual would be given a preference in hiring or promotion because of race or sex to the extent that such individual would attain a positon for which he or she was to the *best qualified.* At the time of the entry of the said consent decrees, the laws of the State of Mississippi required appointments to and promotions in the police and fire departments to be made based *solely* upon merit, efficiency, and fitness, which factors obviously exclude considerations of race or sex, and I, as a Commissioner and a Member of the City Coun-

Any other interpretation which would require "one-to-one" promotions to be made on the basis of race *irrespective* of the black officer's *relative* qualifications would not only violate other provisions of the decrees[8], but would also violate state and federal law.

The *USA* decree's provisions, which were incorporated within the *Corley* decree (and vice-versa), prohibits discrimination against white employees as aforesaid, and requires an "objective reviewable, and *non-discriminatory* method for promoting qualified incumbent employees of the police and fire departments." These provisions militate against an interpretation that would require blacks to be promoted solely because of their race, and not on their own merit.

Section 21-31-13, Miss. Code, 1972 (App. G) requires that promotions in the police department "shall be made solely on merit, efficiency, and fitness," which would prohibit consideration of race.[9] Again the City cannot legally "contract" to violate state law.

In view of the foregoing, it shoud be clear that the decrees do not unequivocally require the promotion of blacks on the basis of their race, and thus the initial count in *Thaggard* does not attack the decrees.

C. The Decision Below Affirming Dismissal of "Retaliation" Charge Conflicts With the Decisions of Other Courts of Appeal

The Ashley complaint contained a separate count based on

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cil, was bound to obey said laws, and I had no authority to agree not to follow said laws." (R.1, V.3, PP. 1185-1187) (emphasis added)

[8]Petitioners, not being a party to the decrees, may not enforce them. *Blue Chip Stamps v. Manor Drug Stores* 421 US 723; *Rule v. Int'l Assn. of Bridge, Structural & Ornamental Ironworkers*, 568 F.2d 558 (8 CA 1977). But, see Jones v. I.U.O.E., 603 F.2d 664 (7 CA 1979) (consent decree creates third party beneficiary rights enforceable in an *independent action*).

[9] See Note 7, *supra*.

discriminatory retaliation in violation of 42 USC 2000e-3(a). There has been no contention by respondents that pursuit of a remedy for said violation would in any way conflict with or "attack" the consent decrees. Nor has said count even been *mentioned* by the lower courts in any of three decisions.[10] Absent explanation, the lower courts were presumably of the opinion that dismissal of the original count alleging discrimination in violation of 42 USC § 2000e-2(a) also justified dismissal of the retaliation charge. The impact of this decision is in conflict with the decisions of other courts of appeal which have held that an employer's liability for retaliation is not dependent upon the merits of a plaintiff's opposition, EEOC charge, or lawsuit challenging employment practices perceived as discriminatory.

In *Sias v. City Demo. Agency*, 588 F.2d 692 (1978), the Ninth Circuit held that both the "participation" clause and the "opposition" clause of 42 USC § 2000e-3(a) shield an employee from retaliation "regardless of the merit" of his allegations of unlawful discrimination, 588 F2d at 695. The Eight Circuit has held that "the claim of retaliation does not hinge upon a showing that the employer was in fact in violation of Title VII". *Sisco v. J.S. Alberici Const. Co.*, 655 F.2d 146, 150 (1981). The Fifth Circuit has ruled likewise. *Pettway v. American Cast Iron Pipe*, 411 F.2d 998 (1969); *Payne v. McLemore's Whol. & Ret. Stores*, 464 F.2d 1130 (1981).

If the fact that petitioner's discrimination claims were dismissed for lack of jurisdiction rather than on the merits renders said conflict indirect, it does not negate the conflict in principle. The essential point is that petitioner opposed the City's practices, and participated in EEOC charges, an investigation, and a lawsuit under Title VII. 42 USC §

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[10] At the time the District Court announced that these cases would be dismissed, counsel specifically asked whether the retaliation count was included, or whether the Court intended to retain jurisdiction thereof for trial. The District Judge was not even aware that said count was contained in the complaint.

2000e-5(f)(3) confers jurisdiction of the retaliation charge even if *no* lawsuit under section 2000e-2(a) had been filed! The principle involved herein, and in the cases cited, that "opposition to perceived discrimination must not be chilled by the fear of retaliatory action in the event the alleged wrongdoing does not exist," *Sias, supra,* at 695, is sufficiently important to merit this Court's attention and protecion.

D. To Bind Petitioners to Consent Decrees to Which They Are Not a Party Would Constitute a Denial of Due Process In Contravention of Decisions of the Supreme Court.

This Court has established that there can be no binding adjudication of a person's rights in the absence of that person. *Mallow v. Hinde,* 12 Wheat 193, 6 LEd 599; *Provident Tradesmens Bank v. Patterson,* 390 US 102 (1968); *Hansberry v. Lee,* 311 US 32 (1940). "Due process prohibits estopping [non-parties to a prior judgement from litigating their claim] despite one or more existing adjudications of the identical issue which stand squarely against their position." *Blonder-Tongue Labs. v. Univ. of Ill. Foundation,* 402 US 313 (1971). If petitioner's actions result in "the granting of collateral relief," such does not render their suits a collateral attack. *Schlesinger v. Councilman,* 420 US 738, 602 (1975). "On the contrary, it means only that for purposes of the matter at hand the judgment must be deemed without res judicata effect: because of lack of jurisdiction or some other equally fundamental defect, the judgment neither justifies nor bars relief from its consequences." *Ibid.* The parties to the decrees cound not "prospectively waive" petitioner's rights, and "in instituting an action under Title VII," petitioners are "not seeking review" of any matter litigated in the consent decree cases. "Rather, [they are] asserting a statutory right *independent of* the decrees. See *Alexander v. Gardner-Denver Co.,* 415 US 36, 54 (1974) for an analogous situation.

The effect of the lower court's decision is to bind petitioners to consent decrees to which they were not a party. In so doing,

the decision denies petitioner's rights to due process and conflicts with applicable decisions of this Court. While it may be hypothetically argued that an alternative procedure, i.e., intervention, is available in lieu of a private action, in view of the fact that intervention in the consent decree litigation was denied, dismissal of petitioner's private lawsuits effectively foreclosed *all* avenues for relief.

E. The Lower Court's Affirmance of Dismissal of Allegations that the Decrees are Void Conflicts With Applicable Decisions of the Supreme Court.

As an alternative count, the petitioners allege that the consent decrees are void on several grounds. The pertinent question at this stage of the litigation is whether the District Court had jurisdiction to determine said issue.

Prior decisions of this Court establish that a void decree is subject to collateral attack at any time and in any proceeding in which the issue arises. *Hansberry v. Lee*, 311 US 32 (1940); *Hovey v. Elliot*, 167 US 409 (1897); *Windsor v. McVeigh* 93 US 274 (1876); *Pennoyer v. Neff*, 95 US 714 (1877); *Kalb v. Feuerstein*, 308 US 433 (1940); *City of New York v. New York, New Haven & Hartford R. Co.*, 344 US 293 (1953); *Fay v. Noia*, 372 US 391 (1963); *Schlesinger v. Councilman*, 420 US 738 (1975). Therefore, petitioners are entitled to a trial on the merits of this issue, and dismissal of same was error.

Among the grounds for said charge, petitioners alleged *inter alia*, that (1) the decrees are unconstitutional, and contrary to public policy and the law, and (2) that the decrees require racial preference for blacks who have never been personally discriminated against by the City, and (3) the decrees were entered without a finding or an admission of any past racial discrimination. Although the merits of these allegations *per se* are not at issue at this stage of the litigation, petitioners think it significant that since the final determination of these appeals below, the United States has taken a virtually *identical* position regarding a one-to-one, black-to-white, police promotion quota contained in a similar consent decree.

In January, 1983, the United States moved to intervene at the appellate level in *Williams v. City of New Orleans,* 5th Cir. No. 82-3435, a case certified by the Attorney General to be of general public importance. Intervention was sought for the purpose of suggesting rehearing en banc of a panel decision which reversed a district court's refusal to approve a consent decree containing the said promotion quota.

In it's brief filed in *Williams,* the United States asserts that "a judicial decree requiring a municipal police department to promote one black police officer for every white officer—without regard to whether the promoted black officer had been an actual victim of discriminatory promotional practices—until blacks constitute 50 percent of the officers in all ranks of the department (1) exceeds the limits of judicial remedial authority under Section 706 (g) of Title VII of the Civil Rights Act, (2) constitutes an inequitable infringement on the interests of innocent non-black employees, and/or (3) violates the equal protection guarantees of the United States Constitution."

In addition to the fact that issues identical to those raised in petitioner's complaints were certified to be of "general public importance", it is noteworthy that the United States asserted that inclusion of said provision would render the *Williams* decree *void.* The *USA, Corley,* and *Bell* consent decrees would be rendered void for the same reasons.

F. An Illegal or Unconstitutional Provision and/or Application of a Consent Decree is Subject to Challenge.

It is not inconceivable that the decrees may contain illegal provisions , and/or that the general provisions may be unjustified as applied in this case. This Court has acknowledged that even where Congress has approved a general race-conscious program designed to correct past discrimination, that a "particular application" of a preference may be overinclusive and bestow a benefit on the basis of race that cannot be justified. ***Fullilove v. Klutznich,*** **448 US 448, 486 (1980). In *U.S. v. City of Alexandria,* 618 F.2d 1358, (5 CA 1980), the Fifth Circuit reversed a district's court's refusal to**

enter a consent decree (involving "numerous Louisiana municipalities") because of possible reverse discrimination that the decree might cause. The Court acknowledged, however, that "since no one has appeared... to urge that the provisions are illegal, unconstitutional, or against public policy, *we cannot be sure that no such argument can be made,*" and specifically stated that the provisions *"which impose hiring and promotion goals" are "possibly subject to attack."* Although involving an objection by a party, Judge Gee's comments in *United States v. City of Miami,* 664 F.2d 435 (5 CA 1981) (concurring in part and dissenting in part) are equally appropriate here:

> "[W]hile it is well and very well to extoll the virtues of concluding Title VII litigation by consent... we think it quite another to approve ramming a settlement between two consenting parties down the throat of a third and protesting one, leaving it bound without trial to an agreement to which it did not subscribe. If this be permitted, gone is the protester's right to appear in court at a trial on the merits, present evidence, and contend that the decree exactions—so that it should not be entered *at all* or so as to bind *any* party *or affected third party.* Who can know what the protestor might have been able to show at such a hearing, one to which first-reader principles of procedural due process entitled it?" *Ibid,* at 451-452.

Petitioner's foremost challenge of the decrees is that there is no legally or constitutionally sufficient basis for the use of racial preferences. "The Equal Protection Clause [of the Fourteenth Amendment], and the equal protection component of the Due Process Clause of the Fifth Amendment, demand that any governmental distinction among groups must be justifiable." *Fullilove, supra,* at 496 (Powell, concurring). A public employer's use of racial classifications in the employment context has been upheld solely for the purpose of remedying past intentional discrimination. *Washington v. Davis,* 426 US 229 (1976); *Arlington v. Metropolitan Housing Development Corp.,* 429 US 252 (1977). "Because the

distinction between permissible remedial action and impermissible racial preference rests on the existence of a constitutional violation, the legitimate interest in creating a race-conscious remedy is not compelling unless an appropriate governmental authority has found that such a violation has occurred." *Fullilove, supra,* at 498.

The consent decrees specifically state that the entry thereof does not constitute an admission or an adjudication of any violation of law by the City.[11] Thus, it is evident on the face of the decrees that the City has no compelling interest in according preferential treatment to blacks on the basis of race, and such preferences, and the decrees, are unconstitutional.[12]

This Court's "past cases also establish that even if the government proffers a compelling interest to support reliance upon a suspect classification, the means selected [to remedy a violation] must be narrowly drawn to fulfill the governmental purpose." *Fullilove, supra, at 498. Regents of the University of California v. Bakke,* 438 US 265, 299 (1978) (Opinion of Powell, J.). It is a "fundamental limitation on the remedial powers of the Federal Courts" that "[t]hose powers [may] be exercised only on the basis of a violation of the law and [may] extend no farther than required by the nature and the extent of that violation." *General Building Contractors Assn. v. Pennsylvania,* 50 LW 4975, 4981 (1982).

Assuming *arguendo* the existence of a compelling interest in correcting past intentional racial discrimination against blacks, the "means selected" by the city is not precisely

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[11] Subsequent to the entry of the decrees, the City continued to deny that it had discriminated against blacks. In *U.S. v. City of Jackson; Loc. Union 1888 v. City of Jackson,* 519 F.2d 1147 (5 CA 1975) the City successfully opposed Local 1888's motion for a summary judgement adjudicating that the City had been guilty of discrimination. Faced with the statistics cited in the *USA-Corley* decrees, as well as evidence submitted by Local 1888, the Fifth Circuit nevertheless concluded that the record was "not yet sufficiently developed to show appellant's entitlement" to said judgenment.

[12] This same position was asserted by the United States in *Williams, supra.*

tailored. The challenged one-to-one hiring and promotion practices embrace blacks who have never been discriminatorily denied employment or promotion by the city.

A court's remedial authority under 706(g) of Title VII is limited to making "'the *victims* of unlawful discrimination whole' by restoring them, 'so far as possible. . .to a position where they would have been were it not for the unlawful discrimination.'" *Ford Motor Co. v. EEOC*, 50 LW 4937, 4940 (1982); *Albemarle Paper Co. v. Moody*, 422 US 405, 421 (1975); *Franks v. Bowman Transp. Co.*, 424 US 747, 764 (1976); accord *Teamsters v. U.S.*, 431 US 324, 364 (1977). Preferences to nonvictims is expressly prohibited by the last sentence of Section 706 which states that "[n]o order of the court shall require....the hiring....or promotion of an individual....if such individual was....refused employment or advancement....for any reason other than discrimination on account of race..." As this Court noted in *Los Angeles Dept. of Water & Power v. Manhart*, 435 US 702, 709 (1978), "the basic policy of [Title VII] requires that [courts] focus on fairness to individuals rather than fairness to classes." Accordingly, in formulating equitable remedies, courts must consider the legitimate interests of "innocent third parties." *Ford Motor Co., Supra*, at 4942; *Los Angeles, supra*, at 723. See also *Teamsters, supra*, at 371-376. As between nonvictims of discrimination and innocent third parties, "it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another." *Bakke, supra*, at 308-309.

In sum, racial preferences accorded to nondiscriminatees——or to discriminatees beyond the extent necessary to make them whole——exceed the scope of permissible remedial relief, serve no compelling governmental interest, and deprive innocent persons of *their* rightful place in violation of the Constitution's equal protection guarantees.

Also, the objective of racially balancing all levels of the City's workforce so as to reflect the percentage of blacks to whites in the working age population of the City, rather than to the

respective labor pools, can hardly be deemed "precisely tailored." Indeed, as this Court has observed, broad based statistics which include a substantial number of people who realistically cannot be considered potential applicants are "virtually irrelevant" for comparison purposes. *New York City Transit Authority v. Beazer*, 440 US 568, 586 (1979); *See also Hazelwood School District v. U.S.*, 433 US at 308, n. 13; *Mayor v. Educational Equality League*, 415 US 605, 620 (1974).

CONCLUSION

Petitioners submit that the Petition for Writ of Certiorari should be granted for the reasons aforesaid.

Respectfully submitted,

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APPENDIX A

R. D. THAGGARD et al.,
Plaintiffs-Appellants,

v.

The CITY OF JACKSON, MISSISSIPPI,
a Municipal Corporation, et al.,
Defendants-Appellees

Ronald N. ASHLEY, Plaintiff-Appellant,

v.

CITY OF JACKSON et al.,
Defendants-Appellees.

R. D. THAGGARD et al.,
Plaintiffs-Appellants,

v.

CITY OF JACKSON et al.,
Defendants-Appellees.

Nos. 78-2980, 78-3642.

United States Court of Appeals,
Fifth Circuit.

Sept. 27, 1982.

Appeals from the United States District Court for the Southern District of Mississippi.

Before GEE and JOHNSON, Circuit Judges, and VAN PELT*, District Judge.

JOHNSON, Circuit Judge:

This consolidated action involves two reverse discrimination cases. Plaintiffs in both cases contend that defendants maintain a discriminatory pattern, practice, and policy toward hiring and promotion. Defendants answer that the challenged practices are mandated by three consent decrees entered on March 25, 1975 in the cases of *United States v. City of Jackson, Corley v. City of Jackson Police Department,* and *Bell v. City of Jackson.* The consent decree entered in *United*

States v. City of Jackson required, among other things, that the City of Jackson, Mississippi adopt and seek to achieve a goal of hiring blacks for one-half of all vacancies in all job classifications, subject to the availability of qualified applicants, until such time as the proportion of blacks to whites in each such classification equalled the proportion of blacks to whites in the working age population of the City of Jackson. The consent decree entered in *Corley v. Jackson Police Department* further provided, among other things, that the City of Jackson Police Department establish separate promotion eligibility lists for white and black employees and that it make future promotions, subject to the availability of qualified black candidates, alternately from each list in one-to-one ratio until the proportion of black persons in supervisory positions and in the ranks of patrolmen substantially equalled the proportion of blacks to whites in the working age population of the City of Jackson. In the *United States v. City of Jackson* consent decree, the district court expressly retained "jurisdiction of this action for such further relief or other orders as may be appropriate." Each consent decree expressly incorporated the other by reference.

Plaintiffs' various motions to intervene in the cases resulting in consent decrees were denied. Additionally, the district court denied motions for temporary restraining orders and temporary injunctions, which were filed in hopes of preventing defendants from continuing certain practices.

The district court, however, granted the United States' motion to intervene in the consolidated cases. The district court also held that the independent reverse discrimination actions constituted an impermissible collateral attack upon the earlier consent decrees and therefore dismissed plaintiffs' complaints. This appeal followed. This court affirms the judgement of the district court.

In this appeal, this Court is not faced with determining whether plaintiffs are entitled to intervene in the principal suits that resulted in the consent decrees. The question before this Court is whether plaintiffs' causes of action are imper-

missible collateral attacks upon those consent decrees. "It is settled that a consent decree is not subject to collateral attack." *Dennison v. City of Los Angeles*, 658 F.2d 694, 695 (9th Cir. 1981)

Plaintiffs argue they are not collaterally attacking the consent decrees. The foundation of their position is that, for various reasons, the challenged activities of defendants are not required by the decrees. Since the practices are not required, plaintiffs argue, their complaints cannot be said to constitute a collateral attack upon the decrees, but only upon the allegedly discriminatory activity. Plaintiffs argue basically that the particular activity complained of could not be required by the consent decrees because (1) it is expressly prohibited by the decrees, (2) it conflicts with the plain meaning of the terms of the decrees, or (3) it violates state and federal law.

In form, plaintiffs' arguments appear to implicate something other than the consent decrees themselves. Examination of the substance of plaintiffs' position reveals, however, that the consent decrees are indeed implicated, and plaintiffs' complaints constitute collateral attacks upon the decrees. At the outset, plaintiffs, by stating that the challenged activity is expressly prohibited by the decrees, are arguing that defendants are not complying with the consent decrees. Accordingly, determination of the validity of plaintiffs' position necessitates a decision regarding what constitutes compliance with the decrees. Additionally, plaintiffs' position necessitates a decision regarding precisely what activity is mandated by the decrees' requirement that defendants "seek to achieve" certain goals.

The district court entering the consent decrees expressly retained jurisdiction "for such further relief or other orders as may be appropriate." Implementation of and continued compliance with the consent decrees is under the supervision of the district court that entered the decrees. It is not up to this Court, or the district court in the instant case, to decide—in a collateral proceeding—whether the challenged hiring or promotion practices are either allowed or mandated by the con-

sent decrees. Accordingly, the district court in the instant case did not err in refusing to accept plaintiffs' invitation to speculate regarding what constitutes compliance with or is required by the consent decrees. Such a determination would mean that the parties to the consent decrees could "be faced with either inconsistent or contradictory proceedings." *O'Burn v. Shapp*, 70 F.R.D. 549 (E.D.Pa. 1976), *affirmed without opinion*, 546 F.2d 417 (3d Cir. 1976), *cert. denied*, 430 U.S. 968, 97 S.Ct. 1650, 52 L.Ed.2d 359 (1977); *Jackson v. Alabama Department of Public Safety*, 657 F.2d 689 (5th Cir. 1981) (holding that parties to a consent decree that later claim the other parties are not in compliance with the decree have a remedy through the enforcement of the decree in the original action and not in an independent action)' *Dennison v. City of Los Angeles*, 658 F.2d at 694; *Black and white Children of Pontiac v. City of Pontiac School District*, 465 F.2d 1030 (6th Cir. 1972) ("The proper avenue for relief if there were unaticipated problems which had developed in the carrying out of the court's order, was an application to intervene and a motion for additional relief in the principal case."); *Prate v. Freedman*, 430 F.Supp. 1373 (W.D.N.Y. 1977), *affirmed without opinion*, 573 F.2d 1294 (2d Cir. 1977), *cert. denied*, 436 U.S. 922, 98 S.Ct. 2274, 56 DL.Ed.2d 765 (1978).

Plaintiffs further argue that "if such practices are required by the decrees, the [next] step [toward resolution of these appeals is] to determine whether such requirements, and/or the decrees, are illegal, unconstitutional, or void."[2] While plaintiffs attempt to characterize their review of state and federal laws as a mechanism for interpreting the true meaning of the decrees, its position, as stated and argued, is akin to a mortar attack on the validity of the decrees themselves.[3] To permit this collateral challenge of the decrees "would clearly violate the policy under Title VII to promote settlement." *Prate v. Freedman*, 430 F.Supp. at 1375 *citing Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496, 498 (5th Cir. 1968). It "would also result in continued uncertainty for all parties involved and

render the concept of final judgments meaningless." *Prate*, 430 F.Supp. at 1375. *See also Hrfner v. New Orleans Public Service, Inc.*, 605 F.2d 893, 898 (5th Cir. 1979) ("[T]o allow plaintiff to attack the decree at this late point would severely undercut important notions of judicial efficiency and finality of judgment, and would unfairly prejudice other parties and nonparties.").[4]

This Court's determination that the district court did not err in dismissing plaintiffs' complaints makes it unnecessary to address plaintiffs' remaining claims regarding the district court's denial of a preliminary injunction and temporary restraining order. This Court's determination also pretermits the need to determine whether the district court erred in granting the Goverment's motion to intervene. The judgment of the district court dismissing plaintiffs' claims for lack of subject matter jurisdiction is affirmed.

AFFIRMED.

*District Judge of the District of Nebraska sitting by designation

[1] Indeed, plaintiffs recognize the necessity of such a determination. At oral argument, plaintiff Ashley—who, as an attorney argued his case pro se—stated, "We are attacking the city's noncompliance with the decree, or its misapplication of the decree".

[2] Plaintiffs also argue that "[i]f the decrees legally allow racial preferences to blacks as a remedy for past racial discrimination by the defendants, the plaintiffs are entitled to seek compensation for their injuries and damages proximately caused by the defendant's own wrongdoing." Plaintiffs further explained this position at oral argument by stating they believe they are entitled to compensation because the City had to enter the decrees to correct past discrimination.

This position is precisely the position that was labeled an impermissible collateral attack in *Dennison v. City of Los Angeles*, 658 F.2d at 694, since "[a]warding compensatory relief to the nonminority employees would impose conflicting or inconsistent obligations." *Id.* at 695.

[3] The district court in the instant case, of course, could not modify the consent decrees. As the First Circuit stated in *Culbreath v. Dukakis*, 630 F.2d 15 (1st Cir. 1980), "only the district court supervising implementation of the decree [would] have subject matter jurisdiction to modify the decree[s]" as they relate to the mechanisms for achieving the goals of the decrees. *Id.* at 22.

[4] *See also Smith v. Missouri Pacific Railroad Company*, 615 F.2d 683 (5th Cir. 1980). *Smith* involved a challenge upon a lawfully entered "Agreed Order" under Rule 60)b) of the Fed. R. Civ. Pro. The district court in *Smith* denied the Rule 60(b) motion to amend the agreed order, and this Court determined that such action was not an abuse of discretion. In so doing, this Court stated that to allow Rule 60(b) re-evaluations of civil rights settlements, which in *Smith* would have been two years after settlement, would violate both the finality and integrity of the settlement process.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NOs. 78-2980
78-3642

RONALD N. ASHLEY,
Plaintiff-Appellant,

v.

CITY OF JACKSON, ET AL.,
Defendents-Appellees.

R. D. THAGGARD, ET AL.,
Plaintiffs-Appellants,

v.

CITY OF JACKSON, ET AL.,
Defendants-Appellees.

Appeals from the United States District Court for the Southern District of Mississippi

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion—September 27, 1982; 5th Cir., 1982, F.2d)

November 19, 1982

Before GEE and JOHNSON, Circuit Judges, and VAN PELT*, District Judge.

PER CURIAM:

( ) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the court be polled on rehearing en banc, (Rule 35 federal Rulese of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ SAM JOHNSON
United States Circuit Judge

*District Judge of the District of Nebraska sitting by designation.

APPENDIX C

R. D. THAGGARD et al.,
Plaintiffs-Appellants,

v.

The CITY OF JACKSON, MISSISSIPPI,
a Municipal Corporation, et al.,
Defendants-Appellees

Ronald N. ASHLEY, Plaintiff-Appellant,

v.

CITY OF JACKSON et al.,
Defendants-Appellees.

R. D. THAGGARD et al.,
Plaintiffs-Appellants,

v.

CITY OF JACKSON et al.,
Defendants-Appellees.

Nos. 78-2980, 78-3642.

United States Court of Appeals,
Fifth Circuit.

June 2, 1980.

Appeals from the United States District Court for the Southern District of Mississippi.

Before HATCHETT and TATE, Circuit Judges, and GROOMS*, District Judge.

PER CURIAM:

In this consolidated action, appellants, Thaggard and Ashley, appeal a district court dismissal of their reverse discrimination suits which challenge the hiring and promotional practices of the City of Jackson, as set forth in earlier consent decrees. Because we find appellants' challenges impermissible collateral attacks, we affirm.

The question whether appellants may intervene in the original actions is not before us. Rather, the question is whether appellants may collaterally attack the City of

Jackson's compliance with two lawfully entered consent degrees. We hold that such collateral attacks are impermissible under *Prate v. Freedman*, 430 F.Supp. 1373 (W.D.N.Y.), *aff'd*, 573 F.2d 1294 (2nd Cir. 1977), *cert. denied* 436 U.S. 922, 98 S.Ct. 2274, 56 L.Ed.2d 765 (1978); *O'Burn v. Shapp*, 70 F.R.D. 549 (E.D.Pa.), *aff'd*, 546 F.2d 417 (3rd Cir. 1976), *cert. denied*, 430 U.S. 968, 97 8Ct. 1650, 52 L.Ed.2d 359 (1977). Cf *Smith v. Missouri Pacific Railroad Co.*, 615 F.2d 683 (5th Cir. 1980). (*Smith* involved a Rule 60(b) challenge upon a lawfully entered "Agreed Order." This court ruled that the district court did not abuse its discretion in denying the motion. The court also stated that to allow Rule 60(b) reevaluations of civil rights settlements, in this instance two years after settlement, would violate both the finality and integrity of the settlement process.)

Accordingly, we affirm the district court's dismissal.

AFFIRMED.

APPENDIX D

R. D. THAGGARD et al.,
Plaintiffs-Appellants,

v.

The CITY OF JACKSON, MISSISSIPPI,
a Municipal Corporation, et al.,
Defendants-Appellees

Ronald N. ASHLEY, Plaintiff-Appellant,

v.

CITY OF JACKSON et al.,
Defendants-Appellees.

R. D. THAGGARD et al.,
Plaintiffs-Appellants,

v.

CITY OF JACKSON et al.,
Defendants-Appellees.

Nos. 78-2980, 78-3642.

United States Court of Appeals,
Fifth Circuit.

March 26, 1981.

Appeals from the United States District Court for the Southern District of Mississippi.

Before HATCHETT and TATE, Circuit Judges and GROOMS,* District Judge.

IT IS ORDERED:

(1)The opinion dated June 2, 1980, 618 F.2d 272 (5th Cir.) in these consolidated actions is vacated.

(2)The Clerk of the Court is directed to set these cases for oral argument before a Unit A panel.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI JACKSON DIVISION

RONALD N. ASHLEY — PLAINTIFF

v. — CIVIL ACTION NO. J76-70 (R)

CITY OF JACKSON, ET AL — DEFENDANTS

R. D. THAGGARD, ET AL — PLAINTIFFS

v. — CIVIL ACTION NO. J78-0218(R)

CITY OF JACKSON, ET AL — DEFENDANTS

OPINION OF THE COURT

On October 23, 1978, the above-styled actions, consolidated by order dated July 10, 1978, were before the Court for oral argument on several motions:[1] namely, a motion by the United States to intervene, motions by the United States and the City of Jackson to dismiss, a motion by the City of Jackson to quash a jury trial, a motion by the United States to stay action, a motion by the Plaintiffs for class certification and a motion by the City of Jackson t disqualify counsel for the Plaintiffs.[2]

The *Ashley* and *Thaggard* cases are reverse discrimination suits which challenge the hiring and promotional practices of the City of Jackson. The practices complained of are the result of consent decrees which were entered on March 25, 1974, in *United States of America v. City of Jackson,* Civil Action No. J74-66(N), and *Corley, et al, v. Jackson Police Department,* Civil Action No. 73J-4(C). *United States of America v. City of Jackson* was a "pattern and practice" suit brought under SEction 707 of the Civil Rights Acto of 1964, as amended by the Equal Employment Opportunities Act of 1972, 42 U.S.C. 2000e *et seg.* Relief was also sought under 42 U.S.C. 1981, 1983 and the Fourteenth Ammendment to the United States Constitution for a broad range of discriminatory practices alleged to have been committed against blacks by the City of

Jackson. *Corley v. Jackson Police Department* was an action under 42 U.S.C. 1981 and 1983 and the Fourteenth Amendment of the United States Constitution which was filed by two black officers discharged from the Jackson Police Department. The *Corley* complaint contained class claims of racial discrimination in hiring and in employment.

The consent decree entered in *United States of America v. City of Jackson* required, *inter alia*, that the City of Jackson adopt and seek to achieve a goal for hiring blacks for one-half of all vacancies in all job classifications, subject to the availablility of qualified applicants, until such time as the proportion of blacks to whites in each such classification equalled the proportion of blacks to whites in the working age population of the City of Jackson. The *Corley v. Jackson Police Department* consent decree incorporated by reference the *United States of America v. City of Jackson* decree and further provided that the Jackson Police Department establish separate promotion eligibility lists for white and black employees and that it make future promotions, subject to the availablility of qualified black candidates, alternately from each such list in a one-to-one ratio until the proportion of black persons in supervisory positions and in the ranks above patrolman substantially equalled the proportion of blacks to whites in the working age population of the City of Jackson. Plaintiffs' challenge of the City of Jackson's compliance with the provisions of these decrees constitutes a collateral attack which this Court finds impermissable under *O'Burn v. Shapp*, 70 F.R.D. 549 (E.D.Pa. 1976), *aff'd*, 546 F.2d 418 (3rd Cir. 1976), *cert. denied*, 430 U.S. 968 (1977) and *Prate v. Freedman*, 430 F.Supp. 1373 (W.D.N.Y. 1977) *aff'd*, 573 F.2d 1294, cert. applied for, 46 L.W. 3546 (U.S. cert. filed 1/17/78) (No. 77-1015).

Accordingly, the motins to dismiss made by the United States[3] and the City of Jackson are granted. All other pending motions in these cases are moot.

/s/ DAN M. RUSSELL, JR.
United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI JACKSON DIVISION

RONALD N. ASHLEY — PLAINTIFF

v. — CIVIL ACTION NO. J76-70 (R)

CITY OF JACKSON, ET AL — DEFENDANTS

R. D. THAGGARD, ET AL — PLAINTIFFS

v. — CIVIL ACTION NO. J78-0218(R)

CITY OF JACKSON, ET AL — DEFENDANTS

ORDER

The Court having heard the parties in open Court and having read the pleadings and memoranda filed by the parties and having duly considered all matters herein, it is hereby ORDERED, ADJUDGED AND DECREED as follows:

1. The United States' motion to intervene in the consolidated cases of *Ashley v. City of Jackson*, Civil Action No. J7670(R), and *Thaggard v. City of Jackson*, Civil Action No. J78-0218(R), is granted.

2. The United States' and City of Jackson's motions to dismiss the consolidated cases of *Ashley v. City of Jackson*, CIvil Action No. J76-70(R), and *Thaggard v. City of Jackson*, Civil Action No. J78-0218(R), are granted.

3. All other motions pending before the Court are moot as a result of the Court's granting of the aforesaid motion to dismiss; namely, the motion by the City of Jackson to quash a jury trial, the motion by the City of Jackson to disqualify plaintiffs' counsel; the motion by plaintiffs to certify as a class action both *Ashley v. City of Jackson* and *Thaggard v. City of Jackson;* the United States' motion to stay consideration of the intervention by R.D. Thaggard, et al, in *Corley and Carter v. Jackson Police Department*, Civil Action No. 73J-4(C); and plaintiffs' second amended motion for a temporary restraining order, for preliminary injunction, or other relief.

This the 14th day of November, 1978.

/s/ DAN M. RUSSELL JR.
United States District Judge

APPENDIX G

Constitutional Provisions and Statutes

I. Constitution of the United States of America

Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 14, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

II. 42 U.S.C.

1981

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

2000e

For the purposes of this subchapter—

(a)The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unicorporated organizations, trustees, trustees in cases under Title 11, or receivers.

(b)The term "employer" means a person engaged in an industry affecting commerce who ahs fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2101 of Title5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

(f)The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision.

(g)The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h)The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes an activity or industry "affecting commerce" within the meaning of the Labor'Management Reporting and Disclosure Act of 1959, and further includes any governmental industry, business, or activity.

(i)The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act.

2000e-2

(a)It shall be an unlawful employment practice for an employer—

(1)to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any in-

dividual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2)to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual or employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(d)It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other taraining or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

2000e-3

(a)It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceding, or hearing

2000e-5

(a)The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title.

(b)Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (herinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such for as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful empolyment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made

public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.

(e)A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date,place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(f)(1)If within thirty days after a charge is filed with Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) or this section, the Commission has been unable to secure from the

respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court

may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsecton (c) or (d) of this secton or further efforts of the Commission to obtain voluntary compliance.

(2)Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3)Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person

would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4)It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5)It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

(g)If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with

or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him or any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

2000e-6

(a)Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any or the rights secured by this subchapter, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herin described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence thae Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or prac-

tice, as he deems necessary to insure the full enjoyment of the rights herein described.

2000e-7

Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.

III. Mississippi Code, 1972

21-31-9

It shall be the duty of the civil service commission to make suitable rules and regulations not inconsistent with the provisions of sections 21-31-1 to 21-31-27. Such rules and regulations shall provide in detail the manner of conducting examinations, appointments, promotions, transfers, reinstatements, demotions, suspensions and discharges, and may also provide for any other matter connected with the general subject of personnel administration, and which may be considered desirable to further carry out the general purposes of sections 21-31-1 to 21-31-27. It shall have the power to conduct investigations, and make reports on all matters touching the enforcement and effect of the provisions of sections 21-31-1 to 21-31-27, and the rules and regulations prescribed hereunder. The commission shall have the power to investigate all complaints which must be reduced to writing, subpoena witnesses, administer oaths, and conduct hearings.

21-31-13

The provisions of sections 21-31-1 to 21-31-27 shall include all full paid employees of the fire and/or police departments of each municipality coming within its purview, including the chiefs of those departments. All ap-

pointments to and promotions in said departments shall be made solely on merit, efficiency, and fitness, which may be ascertained by open competitive examination and impartial investigation. No person shall be reinstated in, or transferred, suspended, or discharged from any place, position or employment contrary to the provisions of sections 21-31-1 to 21-31-27. The governing authorities of the municipality may, with the approval of the civil service commission, extend the benefits of sections 21-31-1 to 21-31-27 to other full time employees of the municipality.

All incumbents and future appointees shall be subject to civil service, except, however, those appointees now and hereafter serving as extra members.

21-31-19

The civil service commission shall keep a list of all members of the said police and/or fire department, and formulate methods of determining the relative qualifications of persons seeking employment in either department; and give preference to those having the best qualifications. The commission shall provide that men laid off because of curtailment of expenditures, reduction in force, and like causes, shall be the last man or men, including probationers, that have been appointed to either the fire and/or police departments, until such reductions necessary shall have been accomplished. However, in the event said department shall again be increased in number, those suspended shall be reinstated before any new appointments shall be made.

APPENDIX H

Memorandum—Permissible Goals and Timetables in State and Local Government Employment Practices

This Administration has, since September 1969, recognized that goals and timetables are in appropriate circumstances a proper means for helping to implement the nation's commitments to equal employment opportunities through affirmative action programs. On the other hand, the concepts of quotas and preferential treatment based on race, color, national origin, religion and sex are contrary to the principles of our laws, and have been expressly rejected by this Administration.

Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, conferred on the Justice Department and the Equal Employment Opportunity Commission enforcement responsibilities for eliminating discriminatory employment practices based upon race, color, national origin, religion, and sex by state and local government employers as set forth in that Act. In addition, under the Intergovernmental Personnel Act and the merit standards statutes, the Civil Service Commission has an obligation to attempt to move state and local governments toward personnel practices which operate on a merit basis. The Department of Labor and other Executive Branch agencies have responsibilities in the area of equal employment opportunities as it affects state and local government employers. This memorandum addresses the question of how the agencies in the Executive Branch (e.g., CSC, EEOC, Justice, Labor and other Federal agencies having equal employment opportunity responsibilities) should act to implement the distinction between proper goals and timetables on the one hand, and impermissible quotas and preferences on the

other, with due regard for the merit selection principles which many states and local governments are obliged to follow, and which some state and local government employers do not properly follow with regard to equal employment opportunities.

All of the agencies agree that there is no conflict between a true merit selection system and equal employment opportunities laws—because each requires nondiscrimination in selection, hiring, promotion, transfer and layoff, and each requires that such decisions be based upon the person's ability and merit, not on the basis of race, color, national origin, religion or sex. The problems arise when an employer pays only lip service to the concept of merit selection, but in fact follows employment practices which discriminate on the basis of race, color, etc.

All of the agencies recognize that goals and timetables are appropriate as a device to help measure progress in remedying discrimination. All agencies recognize that where an individual person has been found to be the victim of an unlawful employment practice as defined in the Act he or she should be given "priority consideration" for the next expected vacancy, regardles of his relative "ability ranking" at the time the new hire is made—this because absent the act of discrimination, he or she would be on the job. All agencies also recognize that it may be appropriate for a court to order an employer to make a good faith, nondiscriminatory effort to meet goals and timetables where a pattern of discriminatory employment practices has been found.

All agencies recognize the basic distinctions between permissible goals on the one hand and impermissible quotas on the other. Quota systems in the past have been used in other contexts as a quantified limitation, the purpose of which is exclusion, but this is not its

sole definition. A quota system, applied in the employment context, would impose a fixed number or percentage which must be attained, or which cannot be exceeded; the crucial consideration would be whether the mandatory numbers of persons have been hired or promoted. Under such a quota system, that number would be fixed to reflect the population in the area, or some other numerical base, regardless of the number of potential applicants who meet necessary qualifications. If the employer failed, he would be subject to sanction. It would be no defense that the quota may have been unrealistic to start with, that he had insufficient vacancies, or that there were not enough qualified applicants, although he tried in good faith to obtain them through appropriate recruitment methods.

Any system which requires that considerations of relative abilities and qualifications be subordinated to considerations of race, religion, sex or national origin in determining who is to be hired, promoted, etc., in order to achieve a certain numerical position has the attributes of a quota system which is deemed to be impermissible under the standards set forth herein.

A goal, on the other hand, is a numerical objective, fixed realistically in terms of the number of vacancies expected, and the number of qualified applicants available in the relevant job market. Thus, if through no fault of the employer, he has fewer vacancies than expected, he is not subject to sanction, because he is not expected to displace existing employees or to hire unneeded employees to meet his goal. Similarly, if he has demonstrated every good faith effort to include persons from the group which was the object of discrimination into the group being considered for selection, but has been unable to do so in sufficient num-

bers to meet his goal, he is not subject to sanction.

Under a system of goals, therefore, an employer is never required to hire a person who does not have qualifications needed to perform the job successfully; and an employer is never required to hire such an unqualified person in preference to another applicant who is qualified; nor is an employer required to hire a less qualified person in preference to a better qualified person, provided that the qualifications used to make such relative judgments realistically measure the person's ability to do the job in question, or other jobs to which he is likely to progress. The terms "less qualified" and "better qualified" as used in this memorandum are not intended to distinguish among persons who are substantially equally well qualified in terms of being able to perform the job successfully. Unlike quotas, therefore, which may call for a preference for the unqualified over the qualified, or of the less qualified over the better qualified to meet the numerical requirement, a goal recognizes that persons are to be judged on individual ability, and therefore is consistent with the principles of merit hiring.

In some job classifications, in which the newly hired person learns on the job the skills required, and where there is no extensive education, experience or training required as prerequisite to successful job performance, many applicants will possess the necessary basic qualifications to perform the job. While determinations of relative ability should be made to accord with required merit principles, where there has been a history of unlawful discrimination, if goals are set on the basis of expected vacancies and anticipated availability of skills in the market place, an employer should be expected to meet the goals if there is an adequate pool of qualified applicants from the discriminated against group from which to make selections; and if the employer does not meet the

goal, he has the obligation to justify his failure.

Similarly, where an employer has purported to follow merit principles, but has utilized selection procedures which are in fact discriminatory and have not been shown validly to measure or to predict job success (see, *Griggs v. Duke Power Co.,* [3 EPD ¶ 8137] 401 U.S. 424), there frequently is no valid basis presently available for ranking applicants objectively in order of the probabilities of success on the job. In such circumstances, all agencies agree that a public employer will be expected to devise or borrow a selection procedure which is as objective as possible and is likely to be proved valid and is not likely to perpetuate the effects of past discrimination; and to meet those goals which have been set on a vacancy basis. The selection procedure should be as objective and job related as possible, but until it has been shown to be valid for that specific purpose, it must be recognized that rank ordering does not necessarily indicate who will in fact do better on the job. Accordingly, if the goal is not being met because of the interim selection procedure, the procedure and other aspects of the affirmative action program may have to be revised. All agencies agree that use of such goals does not and should not require an employer to select on the basis of race, national origin, or sex a less qualified person over a person who is better qualified by objective and valid procedures. Where such procedures are not being utilized, valid selection procedures to determine who will in fact do better on the job should be established as soon as feasible in accordance with the principles set forth in paragraphs 2 and 5 below.

With the foregoing in mind, the agencies agree that the following principles should be followed:

1. Whenever it is appropriate to establish goals,

the goals and timetables should take into account anticipated vacancies and the availability of skills in the market place from which employees should be drawn. In addition, where unlawful discrimination by the employer has been established, the corrective action program, including the recruiting and advertising obligations and the short range hiring goals, should also take into account the need to correct the present effects of the employer's past discriminatory practices.

2. The goals should be reached through such recruiting and advertising efforts as are necessary and appropriate, and the selection of persons only from amongst those who are qualified. A goal, unlike a quota, does not require the hiring of persons when there are no vacancies, nor does it require the hiring of a person who is less likely to do well on the job ("less qualified") over a person more likely to do well on the job ("better qualified"), under valid selection procedures. When the standards for determining qualifications are invalid and not predictive of job success, valid selection procedures should be developed as soon as feasible. Where an employer has followed exclusionary practices, however, and has made little or no progress in eliminating the effects of its past discriminatory practices, the selection standards it proposes to utilize in determining who is "qualified," or "better qualified" will be examined with care to assure that they are in fact valid for such purposes and do not perpetuate the effects of the employer's past discrimination (i.e., which have as little discriminatory impact as possible under the circumstances) and do not raise artificial or unnecessary barriers.

3. In no event does a goal require that an employer must in all circumstances hire a specified number of

persons, because such a goal would in fact be a quota. It is, however, appropriate to ask a court to impose goals and timetables, including hiring goals, on an employer who has engaged in racial or ethnic exclusion, or other unconstitutional or unlawful employment practices. The goals we seek in court, like those accepted voluntarily by employers, are subject to the limitations set forth in this memorandum.

4. As a general matter, relief should be provided to those persons who have been adversely affected as a consequence of the employer's unlawfully discriminatory practices. All agencies will continue to seek insofar as feasible to have persons who can show that they were injured by such practices restored to the position they would be in but for the unlawful conduct. In addition, all agencies will seek to have those persons who have been excluded from consideration or employment because of such discriminatory practices allowed to compete for future vacancies on the basis of qualifications and standards no more severe than those utilized by the employer in selecting from the advantaged groups, unless the increased standards are required by business necessity. Such relief will be sought to prevent the erection of unnecessary barriers to equal employment opportunities. Such relief will not preclude a public employer from adopting merit standards; nor will it preclude such an employer who has previously used invalid selection standards or procedures from developing and using valid, job related selection standards and procedures as contemplated by paragraphs 2 and 5 of this memorandum.

5. Where an employer has utilized a selection device which is itself unlawfully discriminatory, relief should be sought to prohibit the use of that and similar selection devices (i.e., devices which measure the same

kinds of things) together with the development of an appropriate affirmative action plan which may include goals and timetables in accord with the principles set forth in this paper. In addition, we will ask the courts to permit the employer to select (or develop) and validate a job related selection procedure which will facilitate selections on the basis of relative ability to do the job. The speed with which such new selection devices can and should be developed and validated depends upon the facts and circumstances of each case.

Agencies with equal employment opportunity responsibilities should take actions in accordance with the principles outlined in this memorandum in order to assure a coordinated approach within the Executive Branch to eliminate discriminatory employment practices and their consequences.

No. 82-1390

In the Supreme Court of the United States

OCTOBER TERM, 1982

RONALD N. ASHLEY, ET AL., PETITIONERS

v.

CITY OF JACKSON, MISSISSIPPI, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE CITY OF JACKSON, MISSISSIPPI IN OPPOSITION

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QUESTIONS PRESENTED

Whether the court of appeals correctly held that petitioners' challenge to the operation of an existing consent decree should be filed with the district court that has continuing jurisdiction over the enforcement of the decree and not in a separate law suit.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

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BRIEF FOR THE CITY OF JACKSON IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1A-6A) is reported at 687 F.2d 66. The opinion of the district court (Pet. App. 12A-13A) is not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on September 27, 1982. An order denying rehearing (Pet. App. 7A-8A) was entered on November 19, 1982. The petition for a writ of certiorari was filed on February 16, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

On January 11, 1973, a suit was filed by private plaintiffs alleging that the Police Department for the City of Jackson, Mississippi, had engaged in racial discrimination against black applicants and employees. *Corley vs. Jackson Police Department*, Civil Action No. 73J-4(C) (S.D. Miss.).

Thereafter, a similar suit was filed against the City of Jackson, Mississippi, by the United States Department of Justice, *United States vs. City of Jackson*, Civil Action No. J-74-66(N) (S.D. Miss.).

On March 25, 1974, consent decrees, as agreed to by the parties and as approved by the Court, were entered establishing criteria for hiring and promotional practices by the City of Jackson, Mississippi. The district court in approving the decrees expressly retained jurisdiction over the cases for such further relief or other orders as might be appropriate.

While the City continued to operate under the consent decrees, these petitioners filed two additional and separate actions, now consolidated, specifically refering to the previously entered consent decrees claiming a right to seek and obtain relief inconsistent with the terms of the Court approved decrees.

The district court determined that the practices complained of were a result of the consent decrees which the City had previously entered and the suits constituted a collateral attack on decrees over which a different court had retained jurisdiction and dismissed the suits for lack of subject matter jurisdiction.

On appeal, the United States Court of Appeals for the Fifth Circuit held that although the actions now before this Court appear to implicate something other than the consent decrees themselves, the consent decrees were indeed implicated in the petitioners' complaints and the matter now before the Court constituted an impermissable collateral attack upon a preexisting decree.

ARGUMENT

The opinion of the district court (Pet. App. E) sets forth the basis of the consent decrees and the actions upon which they were predicated. The district court found that the practices of which the petitioners now complain were the result of the consent decrees and that the petitioners were challenging the city's compliance with the provisions of those decrees. The district court found that such actions were an impermissible collateral attack.

The court of appeals found as a factual matter that the instant action is a collateral attack upon the consent decrees and stated:

> In form, plaintiffs' arguments appear to implicate something other than the consent decrees themselves. Examination of the substance of the plaintiffs' position reveals, however, that the consent decrees are indeed implicated, and plaintiffs' complaints constitute collateral attacks upon the decrees. At the outset, plaintiffs, by stating

> that the challenged activity is expressly prohibited by the decrees, are arguing that defendants are not complying with the consent decrees. Accordingly, determination of the validity of the plaintiffs' position necessitates a decision regarding what constitutes compliance with the decrees. Additionally, plaintiffs' position necessitates a decision regarding precisely what activity is mandated by the decrees' requirement that defendants "seek to achieve" certain goals. (Pet. App. 3A)

The court of appeals also noted that during argument counsel for the petitioners stated:

> We are attacking the city's noncompliance with the decree, or its misapplication of the decree. (Pet. App. 5A).

The court of appeals noted that the court entering the consent decrees expressly retained jurisdiction "for such further relief or other orders as may be appropriate." (Pet. App. 3A). The court of appeals noted that it was not faced with determining whether the petitioners are entitled to intervene in the principle suits which resulted in the consent decrees.

Indeed, the district court which entered the decrees has conducted hearings and rendered opinions in situations wherein there was a disagreement as to the requirements of the consent decrees. Additionally, the present petitioners have a matter now pending before the court of appeals in *Corely*, one of the consent decree cases, and the court of appeals has suspended a decision on that matter presented by the petitioners until this court rules on the instant petition for writ of certiorari. (App. A to this Response.) Thus, the petitioners have not been denied a reasonable opportunity to present their claims.

The district court and the court of appeals have found that the present matter is an impermissable collateral attack upon a preexisting decree over which a different court has continuing jurisdiction. Other courts which have considered these issues are in agreement. *Dennison vs. City of Los Angeles*, 658 F.2d 694 (9th Cir. 1981); *Culbreath vs. Dukakis*, 630 F.2d 15 (1st Cir. 1980); *Black and White Children vs. School District*, 464 F.2d 1030 (6th Cir. 1972). Other courts are in agreement. *Prate vs. Freedman*, 430 F.Supp. 1373 (W.D. N.Y.), Aff'd Med., 573 F.2d 1294 (2nd Cir. 1977), Cert. denied, 436 U.S. 922 (1978); *O'Burn vs. Shapp*, 70 F.R.D. 549 (E.D. Pa.), Aff'd Mem., 546 F.2d 418 (3rd Cir. 1976), Cert denied, 430 U.S. 968 (1977).

As there is no disagreement among the circuits that consent

decrees involving claims of racial discrimination in employment practices may not be collaterally attacked; as the petitioners presently have a matter pending before the court of appeals in one of the original cases which resulted in the decrees; as the decrees are of a temporary nature; and as some degree of finality must be achieved it is respectfully submitted that the petition for writ of certiorari be denied.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 78-3795

CHARLIE CORLEY and LEVAUGHN CARTER
Individually, etc., et al.,
Plaintiffs

versus

JACKSON POLICE DEPARTMENT, etc.,
et al.,
Defendants-Appellees,

R.D. THAGGARD, et al.,
Applicants for Inervention-
Appellants.

Appeal from the United States District Court
for the Southern District of Mississippi

ORDER

The unopposed letter motion of R.D. Thaggard, et al., and Ronald N. Ashley to continue the suspension of the appeal in the above referenced case is granted to and including January 15, 1983. The suspension of the appeal will continue in force until the final disposition of Nos. 78-2980- R.D. Thaggard, v. The City of Jackson, Mississippi and 78-3642- Ronald N. Ashley v. City of Jackson, by the Supreme Court, provided that within the period above mentioned there shall be filed with the clerk of this Court the certificate of the clerk of the Supreme Court that a petition for writ of certiorari has been filed in those cases in that court. The clerk of this court shall

issue a notice reinstating all proceedings in this appeal upon the filing of a copy of an order of the Supreme Court denying the application for writ of certiorari, or upon the expiration of the suspension granted herein, unless the above-mentioned certificate shall be filed with the clerk of this court within the time stated.

CHARLES CLARK
Chief Judge

No. 82-1390

In the Supreme Court of the United States

OCTOBER TERM, 1982

RONALD N. ASHLEY, ET AL., PETITIONERS

v.

CITY OF JACKSON, MISSISSIPPI, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that petitioners' challenge to the operation of an existing consent decree should be filed with the district court that has continuing jurisdiction over the enforcement of the decree and not in a separate law suit.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1982

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OPINIONS BELOW

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JURISDICTION

The judgment of the court of appeals was entered on September 27, 1982. An order denying rehearing (Pet. App. 7A-8A) was entered on November 19, 1982. The petition for a writ of certiorari was filed on February 16, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On March 25, 1974, consent decrees were entered in the cases of *United States* v. *City of Jackson*, Civil Action No. J-74-66(N) (S.D. Miss.), and *Corley* v. *Jackson Police Department*, Civil Action No. 73J-4(C) (S.D. Miss.), which

were suits challenging, *inter alia*, the City's hiring and promoting practices in its police department (Pet. App. 1A-2A). The decrees themselves established certain objectives for the City of Jackson in its hiring and promotion of city employees (*ibid.*). The district court in entering the decrees expressly retained jurisdiction over the cases "for such further relief or other orders as may be appropriate" (*id.* at 2A).

In 1976 and 1978, petitioners, seven white residents of the City of Jackson, filed separate complaints against the City, which were later consolidated by the district court, alleging that the City had discriminated against them by hiring or promoting less qualified blacks instead of petitioners solely on the basis of their race (Pet. App. 1A).[1] In their complaints, petitioners expressly referred to the consent decrees and claimed a right to "seek and obtain relief inconsistent with the terms of [the decrees]." See First Amended and Supplemental Complaint at 8, *Ashley* v. *City of Jackson*, Civil Action No. J76-70(R) (S.D. Miss. July 11, 1978); Complaint at 6, *Thaggard* v. *City of Jackson*, Civil Action No. J78-0218(C) (S.D. Miss. May 22, 1978).[2] The United

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[1]Petitioners filed related state court actions in 1976 and 1977, challenging the City of Jackson's employment practices. Petitioners were, however, enjoined by the consent decree court from proceeding with these actions on the ground that the relief sought was inconsistent with and might obstruct or interfere with the enforcement and implementation of the decrees. An appeal of this injunction was initiated, but was later dismissed for want of prosecution.

In 1977 and 1978, petitioners also filed motions for leave to intervene in the consent decree suits themselves in order to challenge those decrees on their face. The United States opposed the motions on the grounds that they were untimely, asserted interests already adequately represented by the defendant City, sought to raise legally insubstantial issues and would unduly complicate completed litigation and thus constitute a substantial interference with the orderly process of justice. All of the motions were denied, and none of the denials was appealed.

[2]A copy of both complaints is being lodged with the Court.

States intervened and moved to dismiss on the ground that petitioners' complaints constituted collateral attacks on the earlier consent decrees and thus were improperly brought in a separate proceeding (Pet. App. 2A).

After a hearing, the district court determined that petitioners' suits "are reverse discrimination suits which challenge the hiring and promotional practices of the City of Jackson" (Pet. App. 12A). The court further determined that "[t]he practices complained of are the result of consent decrees which were entered * * * in [*City of Jackson* and *Corley*]" (*ibid.*). The court concluded that petitioners' suits constituted collateral attacks on preexisting decrees over which a different court had continuing jurisdiction and thus dismissed the suits for lack of subject matter jurisdiction (*id.* at 13A-14A).

2. The court of appeals affirmed (Pet. App. 1A-6A). The court determined that although, "[i]n form, [petitioners'] arguments appear to implicate something other than the consent decrees themselves [,] * * * the substance of [petitioners'] position reveals * * * that the consent decrees are indeed implicated, and [petitioners'] complaints constitute collateral attacks upon the decrees" (*id.* at 3A). The court reiterated, quoting *Dennison* v. *City of Los Angeles*, 658 F.2d 694, 695 (9th Cir. 1981), that " '[i]t is settled that a consent decree is not subject to collateral attack' " (Pet. App. 3A).

ARGUMENT

1. Petitioners challenge (Pet. 15-16) the correctness of the decision of the courts below dismissing their discrimination claims without considering their merits. This claim is not worthy of review by this Court. Every court of appeals that has addressed the issue has concluded that where, as here, a consent decree has been entered by a district court and the district court has retained jurisdiction over its operation, objections to or questions regarding the validity of

the decree cannot be litigated through independent lawsuits. *Dennison* v. *City of Los Angeles*, 658 F.2d 694, 695 (9th Cir. 1981); *Culbreath* v. *Dukakis*, 630 F.2d 15, 22 (1st Cir. 1980); *Black and White Children* v. *School District*, 464 F.2d 1030 (6th Cir. 1972); *Prate* v. *Freedman*, 430 F. Supp. 1373 (W.D.N.Y.), aff'd mem., 573 F.2d 1294 (2d Cir. 1977), cert. denied, 436 U.S. 922 (1978); *O'Burn* v. *Shapp*, 70 F.R.D. 549 (E.D. Pa.), aff'd mem., 546 F.2d 418 (3d Cir. 1976), cert. denied, 430 U.S. 968 (1977).[3]

These decisions are plainly correct. To permit independent lawsuits challenging the validity of consent decrees over which a court has retained jurisdiction would foster an unnecessary proliferation of lawsuits, create a needless danger of inconsistent or contradictory adjudications, and create uncertainty as to a decree's validity and finality. See *Dennison* v. *City of Los Angeles*, *supra*, 658 F.2d at 696; *O'Burn* v. *Shapp*, *supra*, 70 F.R.D. at 552. The rule against collateral attacks is necessary and appropriate to enable the court, which has approved the entry of the decree and is thus in the best position to judge whether changed circumstances warrant its modification, to ensure the decree's just and orderly implementation.

2. In addition to requesting review of the general rule against collateral attacks on consent decrees, petitioners also ask (Pet. 18-22) the Court to review the district court's specific conclusion, affirmed by the court of appeals, that petitioners' suits are in fact collateral attacks on the *Corley* and *City of Jackson* consent decrees (Pet. App. 3A-4A;

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[3]Because it is jurisdictional in nature, the rule obviously controls regardless of the validity of the contentions sought to be litigated. Thus, the district court here quite properly did not consider or discuss the merits of petitioners' contentions as to the *Corley* and *City of Jackson* decrees; nor did the court of appeals. Although petitioners persist in arguing the merits at length in their petition (Pet. 23-28), they are not properly before the Court and accordingly we do not address them.

id. at 12A-13A). This case-specific issue clearly does not warrant review by this Court. Even a cursory examination of petitioners' complaints shows conclusively that the courts below were correct in their evaluation of the nature of petitioners' lawsuits.

3. Contrary to petitioners' contention (Pet. 22-23), the decision of the court of appeals in no way deprived them of a reasonable opportunity to assert their reverse discrimination claims. They can always move to intervene directly in the consent decree suits and seek relief in that forum; that is the proper, and fully adequate, procedural recourse under the circumstances. See, *e.g., Culbreath* v. *Dukakis, supra,* 630 F.2d at 22; *Hines* v. *Rapides Parish School Board,* 479 F.2d 762, 765 (5th Cir. 1973) (footnote omitted) ("proper course for parental groups seeking to question current deficiencies in the implementation of desegregation orders is for the group to petition the district court to allow it to intervene in the prior action"); *Black and White Children* v. *School District, supra,* 464 F.2d at 1030 (The "proper avenue for relief if there were unanticipated problems which had developed in [the] carrying out [of the court's] order was by way of an application to intervene and a motion for additional relief in the principal case"). See generally Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators,* 81 Harv. L. Rev. 721-723 (1968).[4]

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[4]Of course, for a variety of reasons which would not violate due process, intervention may not always be granted. See, *e.g., Culbreath* v. *Dukakis, supra,* 630 F.2d at 23. For instance, where—as apparently was the case here—intervention is sought in order to challenge the decree facially, it may be that the motion would be properly denied as not timely filed as required by Fed. R. Civ. P. 24. But even in that event, the objector may be able to intervene to complain about the manner in which the decree is being applied to him. Accordingly, petitioners' previous failure to intervene successfully is not necessarily an obstacle to a new challenge based on a different theory.

CONCLUSION

The petition for a writ of certiorari should be denied.[5]

Respectfully submitted.

REX E. LEE
Solicitor General

APRIL 1983

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[5]Petitioners argue (Pet. 20-22) that petitioner Ashley's Title VII retaliation claim has been improperly lumped with the challenges to the operation of the consent decree and should not have been dismissed. Since this issue is irrelevant to the validity of the consent decree and is properly directed only at the City respondents—there being no allegation that the federal government retaliated against Ashley—we do not comment on this issue.

DOJ-1983-04

No. 82-1390

In The

Supreme Court of the United States

October Term, 1982

Ronald N. Ashley and R. D. Thaggard, et al,
Petitioners

—v.—

The City of Jackson, Mississippi, et al, and
The United States of America,
Respondents

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITIONERS' REPLY BRIEF

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Questions Presented

1. Whether consent decrees between a municipality, the United States, and minority individuals, entered without findings of identified discrimination, may legally or constitutionally vitiate the individual right of action and bar persons not party to, and who were denied intervention in the consent decree litigation from instituting independent reverse discrimination suits against the municipality (A) challenging racial preferences *not required* by the decrees, (B) challenging preferences accorded to nondiscriminatees, or to discriminatees beyond the extent necessary to make them "whole", and (C) challenging the decrees as unlawful, unconstitutional, and void.

2. Whether, consistent with Due Process, the individual *right* to sue under, *inter alia*, the Fourteenth Amendment and Title VII may be judicially limited solely to the mere *possibility* of intervention in prior government consent decree litigation, especially where such intervention has been denied.

3. Whether Title VII's "parallel and overlapping remedies" confer upon District Court jurisdiction of individual reverse discrimination and retaliation suits where the resultant judgment on the merits might be inconsistent with prior consent decrees entered in settlement of a government "pattern or practice" suit.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITIONERS' REPLY BRIEF

INTRODUCTION

The Briefs in opposition filed by the United States and the City of Jackson, Mississippi, collectively assert **(1)** that the lower court's dismissal of petitioners' independent reverse-discrimination suits for lack of subject-matter jurisdication as being impermissible collateral attacks upon prior consent decrees is supported by applicable precedent; **(2)** that the "merits" of petitioners actions are "case-specific" and are not properly before the court; and **(3)** that petitioners have a "reasonable opportunity to present their claims by intervention in the consent decree litigation.

ARGUMENT

1. The initial thrust of Petitioners' actions, and their petition herein, is premised upon the contention that the challenged employment practices are not required by the subject consent decrees, and, logically, that their actions do not "attack" the

decrees.[1] The US asserts that "[b]ecause it is jurisdictional in nature, the rule (against collateral attacks) obviously controls *regardless of the validity of the contentions sought to be litigated,*" and that "the merits of Petitioners' contentions. . .are not properly before the Court" (US Brief, p.4, n.3). Not only is the governments' position illogical and bad law, it is also contrary to prior decisions of this Court and various Courts of Appeal.

In *Land v. Dollar,* 330 US 731, 735 (1947), this Court recognized that there were types of cases "where the question of jurisdiction is dependent on decision of the merits." The Fifth Circuit has held that "where the factual and jurisdictional issues are completely intermeshed the jurisdictional issues should be referred to the merits, for it is impossible to decide the one without the other." *McBeath v. Inter-American Citizens for Decency Com.*, 347 F.2d 359, 363 (5th Cir. 1967). See also, *Schramm v. Oakes,* 352 F.2d 143 (10th Cir. 1965); *Firemans Fund Ins. Co. v. Railway Express Agency,* 253 F.2d 780 (6th Cir. 1958).

Similarly, it is impossible to fairly decide whether petitioners are "attacking" the consent decrees without first determining whether the decrees actually require the challenged racial preferences. Accordingly, Petitioners are entitled to a resolution of the merits of the issue as a necessary and proper prerequisite to a factual determination of the jurisdictional question raised by respondents.

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[1]It is the resolution of the "merits" of this issue that the respondents obviously wish to avoid. Although Petitioners also briefly discussed the "merits" of their alternative allegations that the decrees are void, they do not seek this Court's resolution of the issue, but only a reaffirmation of its' prior decisions establishing the right to litigate the issue in a collateral proceeding. The brief discussion of the merits of this latter issue was undertaken to demonstrate that said allegations are not frivilous, and that the United States has itself challenged a similar consent decree on virtually identical grounds before the Fifth Circuit *en banc* in *Williams v. City of New Orleans, Louisiana,* 5th Cir. No. 82-3435.

2.A. The United States contends that resolution of the intermingled merits/jurisdictional issue as aforesaid is not worthy of review in that it calls for a "case-specific" review of "the District Court's *specific conclusion*, affirmed by the Court of Appeals, that Petitioners' suits are *in fact* collateral attacks on the. . .consent decrees" (US Brief, p.4, par.2). (emphasis added) Conversely, and almost in the same breath, the United States asserts that "the District Court. . .***did not consider*** or discuss the merits of Petitioners' contentions as to the. . .decrees; nor did the Court of Appeals" (US Brief, p.4, n.3). Pure double-talk. It is obviously impossible to arrive at a "specific conclusion" that Petitioners' actions are "in fact" collateral attacks without first ***considering*** the facts. . .which the Fifth Circuit admittedly refused to do.

Accordingly, a case-specific resolution of the facts relevant to the jurisdictional question herein is absolutely necessary. The larger jurisdictional issue, however, is whether, prior to dismissal of an independent action under the "collateral attack" rule, the Court must determine **(1)** that the plaintiffs are bound to the prior decree, **(2)** that the challenged practices are actually required by the decrees, and/or **(3)** that such practices, if required, are nevertheless subject to collateral attack as being illegal, inequitable, contrary to public policy, and/or unconstitutional.

B. Furthermore, a definitive resolution by this Court of the issues herein could have a significant impact far beyond this specific case.

Included within the first question presented for review is the subsidiary question, whether it is necessary or proper for a local government employer to accord racial preferences in order to achieve affirmative action "goals" agreed to in a consent decree with the United States. Petitioners submit that a negative answer is a foregone conclusion in view of the Government's policy statement on that specific issue(Pet. App. H). Because said policy would apply in all similar and

pending consent decree litigation,[2] the Court's answer would likewise apply and would provide valuable and far-reaching guidelines.

Also included therein are the questions **(1)**whether racial preferences may be accorded to non-victims of racial discrimination, or to victims beyond the extent necessary to make them "whole"; and if not, **(2)**whether "innocent" third parties adversely affected thereby have a right to institute independent lawsuits challenging same and to seek compensatory and/or injunctive relief. One hardly needs to elaborate on the impact of an answer to these questions.

3. The cases cited by Respondents in support of the Lower Court's decision are distinguishable from Petitioners' actions in several respects.

First, the courts determined that the practices or actions challenged by the plaintiffs in the cited cases were specifically *required* by the various consent decrees.[3] In Petitioners' case

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[2]A Department of Justice report obtained subsequent to the filing of the Petition herein revealed that there were in effect approximately 65 consent decrees between the United States and approximately 141 state and local government employers and agencies, which decrees contain hiring, promotion, and/or recruitment "goals". The genesis of Petitioners' actions was the City's unnecessary use of racial preferences, in violation of the law, in attempting to meet its "goals" under the consent decrees. The number of employees and applicants for employment and/or promotion in the other 141 states, cities, etc., who have been, are being, and will continue to be similarly adversely affected by such governmental misconduct can only be imagined, but the number is no doubt considerable.

[3]*O'Burn v. Sharp*, 70 F.R.D. 549, 551, (E.D. PA. 1975). Plaintiffs sought "a permanent injunction against the use of the hiring and promotion procedures *mandated by*" the decrees, and "a permanent injunction against the implementation of the...consent decree." (emphasis added); *Prate v. Freedman*, 430 F. Supp. 1373, 1375 (W.D. NY 1977) "[T]he practices which the plaintiffs challenge were properly *established by*...the...consent decree." (emphasis added); *Black and White Children of Pontiac v. City of Pontiac School District*, 464 F.2d 1030 (6th

the Fifth Circuit refused to even consider the question.

The second distinguishable aspect of said cases is that there apparently was no issue regarding a denial of due process caused by binding the plaintiffs therein to a consent decree to which they were not a party. The issue either was not raised, the plaintiffs had notice of and an opportunity to intervene and object to the entry of the decrees prior to their entry[4] but failed to do so, or the plaintiffs actually participated in the formulation and approval of the decrees,[5] or, unlike the situation herein,[6] intervention was still an available procedure.[7]

Cir 1972) "Plaintiffs...sought an injunction restraining the (defendant) from transporting children *pursuant to* an order of the United States District Court..." (emphasis added); *Dennison v. City of Los Angeles*, 658 F.2d 694, 695 (9th Cir. 1981) action sought "to compensate non-minority employees denied promotions as a result of an affirmative action program established *pursuant to* a consent decree..." (emphasis added).

The Court's incidental discussion of collateral attack in *Culbreath v. Dukakis*, 630 F.2d 15, 22 (1st Cir. 1980) is *mere dicta*, the sole issue therein being whether the District Court abused its discretion in denying intervention.

[4]*Prate v. Freedman, supra*, at 1374: "[T]he plaintiffs (previously) had notice of the terms of the consent decree but failed to act..."; *Dennison v. City of L.A., supra*, at 695: Prior to approval of the decree "the District Court conducted a Fairness Hearing to allow persons who had previously submitted written objections to the consent decree the opportunity to present orally their objections to the Court. Written notice of the hearing was sent to all employees. "The (Apellant) appeared at the hearing and...criticized the adverse impact of the consent decree on non-minority employees."; *Culbreath v. Dukakis, supra*, at 21: "[T]he District Court issued a published decision in which it specifically invited intervention from proper parties."

[5]See *O'Burn v. Sharp*, 393 F.Supp. 561 (ED PA 1975)

[6]The District Court summarily denied Ashley intervention in the *USA* case, and denied the *Thaggard* plaintiffs intervention in the *Corley* case.

[7]*Black and White Children of Pontiac, supra*, at 1031: Impliedly, "the door of the District Court is clearly open (as it has been!) to *the parties* to present any unanticipated problems...(emphasis added).

Finally, none of the cases cited involved a consent decree entered in a government "pattern and practice" suit in the Fifth Circuit, and thus the plaintiffs were not confronted with the all-but-absolute bar to intervention established in *U.S. v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826 (5th Cir. 1975).[8]

4. Respondents contend that Petitioners have a "reasonable opportunity" to present their claims by intervention in the consent decree litigation (US Brief, p.5, par.3; City Brief, p.3). This is a particularly audacious statement in view of the fact that such intervention was ***denied... without explanation!***

The point here, that should be of utmost concern to this Court, is that a "reasonable opportunity" to present a claim does not equate with the *right* to sue under the Constitution and Laws of the United States.[9]

True, the District Court could have considered Petitioners' claims by intervention. It had the opportunity and could have consolidated their actions with the consent decree actions.[10] It could have taken ancillary jurisdication of their actions.[11] But

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[8]The *Allegheny* decision held that *no* private party has a *right* to intervene in a government "pattern or practice" suit, and that there is a "...strong judicial policy against nonexpress private intervention in governmental enforcement litigation *when an adequate private remedy is freely accessible.* (cites ommited) This policy likewise applies to applications for intervention by right under Rule 24(a) (2), and applications for permissive intervention under Rule 24(b)." 517 F.2d at 844 (emphasis added).

[9]The rule urged by Respondents could easily be abused and is lacking in specificity. Substitution of specific statutes of limitation with subjective determinations of whether a motion to intervene is "timely" would provide little guidance to would-be plaintiffs.

[10]See, e.g., *Brewer v. Republic Steel Corp.*, 8 F.E.P. cases 517 (N.D. Ohio 1974).

[11]When an independent equtable action to enjoin or otherwise give relief

having failed to allow intervention, the Court should not also be allowed to deny Petitioners their right to institute an independent action, their only realistic[12] alternative.[13]

5. Finally, Petitioners will briefly respond to the various reasons offered by the United States in support of the decision below. First, a decision, permitting independent lawsuits challenging consent decrees (or the misapplication thereof) will not in and of itself "proliferate" lawsuits.[14] It is the inclu-

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from a federal judgement is brought in the same federal court which rendered the judgment under attack, the action is ancillary for purposes of federal jurisdication and new jurisdictional grounds are not needed. *Pacific Railroad of Missouri v. Missouri Pacific Railway*, III US 505, at

[12]"Post judgement intervention is rare." *U.S. v. Allegheny-Ludlum Inds., Inc.*, 553 F.2d 451 (5th Cir. 1977)

[13]In *O'Burn v. Sharp, supra*, at 552, the court noted that if "the plaintiffs *had no alternative* but to institute an independant lawsuit in order to challenge the . . .consent decree," they might be entitled to do so.

Distinguishing *Harmon v. San Diego County*, 477 F.Supp. 1084 (S.D. Cal. 1979), a case very similar to Petitioners' actions, the Court in *Dennison, supra*, noted that the consent decree the County asserted was being collaterally attacked did not require the challenged practices, and that "Harmon had twice attempted to intervene in the consent decree action, but his efforts were strenuously and successfully opposed by the County." 658 F.2d 694 at 697, N.2.

[14]On the contrary, it is the rule sought by Respondents that would "proliferate" needless actions. Post-judgment intervention being rare, the rule would, for example, compel non-minorities to immediately seek to intervene whenever a minority filed suit seeking class-wide "affirmative" relief, just in case the relief, if granted, might somehow affect their interests. A ridiculous situation at best, with obvious problems facing the would-be intervenors at the pre-decree stage, such as establishing interest impairment, standing, etc . . .

The burden should be on the parties to consent decrees to limit preferential remedies to the extent necessary to restore actual, indentifiable victims of proven discrimination to their "rightful place" or to make them "whole". If the agreed relief is so limited, there would be no cause for ob-

sion by the parties of impermissible provisions, or the misapplication of abuse of consent decrees by the parties, for example, that gives rise to lawsuits. And *if*, as the Justice Department contends, intervention is such a reasonable and viable alternative to an independent lawsuit, the issues raised by non-parties to the decree would ultimately be decided by the Court in *either* event, but the total number of *claims* would be the same. On the other hand, a decision allowing such independent actions would eliminate the unnecessary barriers to the courthouse that are associated with intervention, and would reaffirm "that. . .persons forced to settle their claim of right and duty through the judicial process (will) be given a meaningful opportunity to be heard." *Boddie v. Conn.*, 401 US 371, 377 (1971).

Insofar as the "danger of inconsistent or contradictory adjudications" is concerned, the Fifth Circuit has specifically recognized that non-partys to consent decrees may obtain "double, multiple, or otherwise inconsistent" relief in an independent action. *U.S. v. Allegheny Ludlim Ind., supra*, at 877. If Petitioners establish their right to such relief *on the merits*, it should not be denied merely because other parties in another suit had agreed to "inconsistent or contradictory" provisions. Because Petitioners are not party to the consent decrees, "(d)ue process prohibits estopping them despite one or more existing adjudications of the indentical issue which stand squarely against their position." *Blonder-Tongue Labs v. Univ. of Ill. Foundation*, 402 US 313, 329 (1971). And because the District Court that approved the decrees lacked jurisdication over the Petitioners, the decrees do not bar Petitioners from obstaining collateral relief. *Schlesinger v. Councilman*, 420 US 738 (1975).

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jection. But if the agreed relief exceeded statutory or constitutionally permissible limits, persons adversely affected thereby should be entitled to institute an independent action challenging same, as in the case of any other unlawful discriminatory act.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectively submitted,

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